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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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† Beginning, June term, 1879.

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* Died May 14, 1880.

† Appointed May 20 1880, *vice* Sanford E. Church.

‡ Appointed May 26, 1880, *vice* Charles J. Folger, appointed Chief Judge.

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ERRATA.

- Page 89. First line of head note, for "their" read "its."
- Page 92. Ninth line from bottom, for "latter" read "former."
- Page 122. Fourth line of head note, insert "without" before "consent."
- Page 250. Second line of head note, after "legal rate" insert "after maturity."
- Page 428. Sixth line from bottom, for "undivided" read "individual."

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

HUTCHINSON V. STATE.

(63 Ala. 8.)

Criminal law — carrying concealed weapons — in parts.

One who conceals on his person the various parts of a pistol, incapable of use while thus separate, but capable of being readily put together and becoming effective as a pistol, is guilty of carrying concealed weapons.*

CONVICTION of carrying a pistol concealed on the person.
The opinion states the case.

W. D. Roberts, for appellant.

H. C. Tompkins, attorney-general, *contra*.

MANNING, J. Appellant was indicted for carrying a pistol concealed about his person. The evidence was that the cylinder of the pistol was separated from the rest of the fire-arm, and both parts carried by defendant in his pocket, without any thing

*See *Williams v. State*, post.

to prevent an easy readjustment of the parts, to make the weapon effective.

Under the authority of *Atwood v. State*, 53 Ala. 508 (see note, 25 Am. Rep. 563), and the cases therein referred to, we hold that the Circuit judge did not err in the charge given, or in his refusals to charge as requested.

Let the judgment of the Circuit Court be affirmed.

Judgment affirmed.

DOTSON V. STATE.

(62 Ala. 141.)

Criminal law — bigamy — intent.

One who remarries, knowing his first wife to be living, or not having a reasonable belief of her death, is guilty of bigamy, without other proof of intent.*

CONVICTION of bigamy. The defendant requested the following written charges: 1. If the jury believe from the evidence, that at the time the defendant was married the second time, he believed his first wife was dead, then the defendant must be acquitted. 2. The intent is a material ingredient of the offense. The court refused to give either of said charges.

McClellan & McClellan, for appellant.

H. C. Tompkins, attorney-general, *contra*.

BRICKELL, C. J. [Omitting minor points.] Construed in connection with and in light of the evidence, the charges requested by the appellant were properly refused. The rule of the common law, of very general application, is that there can be no crime when the criminal mind or intent is wanting. When that is dependent on a knowledge of particular facts, ignorance or mistake as to these facts, honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal responsibility. *Gordon v. State*, 52 Ala. 308; s. c., 23 Am. Rep. 575; *Squire v. State*, 46 Ind. 459; s. c., 2 Green Cr. Rep. 725. The

* See *Halsted v. State* (12 Vroom, 552), 32 Am. Rep. 247.

Dotson v. State.

principle is thus stated by Bishop : " The wrongful intent being of the essence of every crime, the doctrine necessarily follows that, whenever a man is misled without his own fault or carelessness, concerning facts, and while so misled, acts as he would be justified in doing were the facts as he believes them to be, he is legally innocent, the same as he is innocent morally." 1 Bish. Cr. Law, § 303, The belief must be honest and real, not feigned, and whether it is honest or feigned, the jury must determine in view of all the evidence. Whether there was fault or carelessness in acquiring knowledge of the facts, is also a matter for their determination. No man can be acquitted of responsibility for a wrongful act, unless he employs " the means at command to inform himself." Not employing such means, though he may be mistaken, he must bear the consequences of his negligence. If he relies on information obtained from others, he should have some just reason to believe that from them he could obtain information on which he may safely rely. It does not appear that the persons informing the appellant of the death of his first wife had any opportunities of knowing the fact—he did not save, nor on what their knowledge of the fact was based—nor was it shown that he made inquiries of persons, who from their relationship or acquaintance with the wife, would have known whether she was living or dead. Bigamy is a violation of positive law, disturbs the peace of families, offends the good order of society, and involves the legitimacy of children, the descent and succession to estates. A degree of diligence commensurate with the importance of the act—a second marriage, having had a former wife, not so long absent and unheard of, that the law presumed her death—the appellant should have exercised. The charge requested withdrew from the consideration of the jury the important inquiry, whether the belief of the death of the first wife was reasonable, and of the diligence the appellant had exercised to inform himself of the fact.

The second charge, without explanation, would have misled, or was well calculated to mislead the jury. It would have induced, or is calculated to have induced, the belief that some other intent than that which must be inferred from the second marriage, knowing the first wife to be living, or not having a reasonable belief of her death, was an ingredient or element of the offense. A charge requested, which requires explanation or qualification, or which has a tendency to mislead or confuse the jury, should always be refused. There is

no legal right to such an instruction. The charge in itself, when applied to the facts, is erroneous. A criminal intent is generally an element of crime, but "whatever one voluntarily does, he of course intends to do," and whenever an act is criminal under particular circumstances, the party doing the act is chargeable with the criminal intent. *Com. v. Mash*, 7 Metc. 472; *Reynolds v. U. S.*, 98 U. S. The appellant knew he had been once married—that the marriage had never been dissolved—that his wife had not been so long absent a presumption of her death could be indulged, and by the slightest diligence could have ascertained she was living within a few miles of him. A second marriage was a violation of the law, and he must be presumed to have intended the violation. We are satisfied no error was committed by the Circuit Court, and the judgment is affirmed.

Judgment affirmed.

HERRING V. SKAGGS.

(62 Ala. 180.)

Agency — power of agent to warrant — damages for breach.

In an action for breach of warranty of a safe sold and warranted by an agent, *held*, (1) that there must be proof of express authority from the principal, or of a custom to warrant;* and (2) that in the absence of fraud the value of articles stolen from the safe by burglars could not enter into the damages.

ACTION of damages for breach of warranty of a safe sold by Stewart as defendant's agent, and by him warranted burglar-proof. Evidence offered by defendant that Stewart was not authorized so to warrant was excluded. The safe was broken open by burglars, and valuables were stolen therefrom. The opinion states other facts. The plaintiff had judgment below.

Walden & Parsons, for appellants.

Samuel F. Rice, contra.

STONE, J. In *Skinner v. Gunn*, 9 Port. 305, speaking of the

* To same effect, *Cooley v. Perrine*, (12 Vroom, 822), 33 Am. Rep. 219.

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power of an agent to bind his principal, this court said: "The power in this case is to sell and convey the negro in the name of the plaintiff, and the agent must, as an incident of that power, and in the absence of any prohibition, have the right to warrant the soundness of the slave, as that is a usual and ordinary stipulation in such contracts, and must therefore be implied to effectuate the object of the power." The court, in the same case, had said: "An authority to do an act must include power to do every thing usual and necessary to its accomplishment." This doctrine was reaffirmed in *Gaines v. McKinley*, 1 Ala. 446, and in *Cocke v. Campbell*, 13 id. 286. It will be observed that in these cases the court states, as matter of law, that power given to sell a slave carried with it power to warrant his soundness, in the absence of prohibition. A similar principle is found in the books in reference to the power of an agent to bind his principal, by warranty of the soundness of a horse he is authorized to sell. It is a "usual and ordinary stipulation in such contracts," say the courts. Perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge. Certainly it was not intended to be affirmed that an agent with general powers of sale has unlimited power to bind his principal by any and every stipulation the various phases of traffic may be made to assume. If so, the words, "in the absence of prohibition," found in the case of *Skinner v. Gunn*, *supra*, are meaningless and powerless. In the case of *Fisher v. Campbell*, 9 Port. 210, a question arose on the implied power of an agent to bind his principal. That was the case of a non-resident planter, whose overseer in charge made purchases of supplies for the plantation and hands. It was proved that the employer had given the overseer instructions to purchase pork for his slaves from a particular mercantile house at Montgomery, with whom he had made arrangements for that purpose, and had given him no directions to buy anywhere else, nor had he any authority to purchase from any other person. The plantation was in Lowndes county, and the roads being bad, the overseer purchased pork in his own county, much nearer to him, and at Montgomery prices. Commenting on a charge requested by plaintiffs, and refused by the court below, this court said, "The last branch of the charge is stated as a corollary from the preceding propositions, 'that any special directions given to McMay (the overseer) by the defendant, as to the place of purchasing, was

wholly immaterial as to this purchase, unless from the evidence they were satisfied that plaintiffs were informed at the time of such sale of such special directions; and that without this information, the plaintiffs would be entitled to recover, if the proof was fully made out.' We understand the law to be the exact converse of this proposition. When a person deals with one who professes to be the agent of another person, the person contracting with him is bound to know the extent of his authority. See, also, *McCrary v. Slaughter*, 58 Ala. 230.

We are not prepared to assent to the doctrine, in unlimited sense, that a general agent to sell has, by virtue thereof, the power to bind his principal by every species of warranty a purchaser may exact. In Benj. on Sales, § 624, is the following language: "Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." We fully approve and adopt this language of this very accurate writer. We do not intend, however, to overturn the doctrine declared in *Skinner v. Gunn* and *Cocke v. Campbell*, *supra*. As a general rule, the agent has power to do whatever is usual — to enter into such express stipulations as are usual and customary — in effecting such sales. What stipulations are usual and customary in effecting such sales is not always matter of judicial knowledge. It is declared in the sale of slaves and horses to be within the knowledge of the court that it is usual to give warranties. It cannot be affirmed that such custom exists in the sale of all chattels. Generally, and we hold in a sale like the present, "it is a question for the jury to determine what is usual." This, in the absence of express authority in the agent to warrant; for if the agent had such express authority, then his act is the act of his principal. And in the absence of express authority, the question arises, and it is one for the jury, whether such warranty is customary in the sale of safes. If the jury, on the evidence, find there was such custom, then the principal is bound, "in the absence of prohibition" resting on the agent, and brought to the knowledge

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of the purchaser, to the same extent as if the principal had himself given the warranty. On the other hand, if there was no such authority given, and no such custom found to exist, then the principal would not be bound. True, if the principal ratified the act of such agent, although the act itself had been unauthorized, this would bind the principal. But the receipt of the purchase-money would have no such effect, unless received or retained with knowledge that the agent had given the warranty.

The sale in the present case was made by an agent. In the absence of proof of express authority to warrant, it was incumbent on the plaintiff to show a custom in the sale of safes, to warrant them as burglar-proof. Either the express authority, or the authority implied from such proven custom, would constitute the act of the agent the act of the principal; but the law does not imply the authority from the fact that Stewart, who conducted the sale, was a general agent. The third count of the complaint avers that the defendants "did employ an agent, and authorized him to sell such safes, and did hold him forth to the public residing in and about the town of Talladega, Alabama, and elsewhere, as their general agent for the sale of iron safes." This is the entire averment of authority, and we hold it insufficient. It should have been averred that the agent had authority to make the warranty. Being averred, proof of express authority, or custom to warrant, would have sustained the averment. The third count is insufficient, and the demurrer to it should have been sustained.

Under the principles above declared, it became a material inquiry whether Stewart had express authority to warrant the safe as burglar-proof. He should have been permitted to prove he had not such express authority. True, this would not necessarily exonerate the defendants. It would bear on only one phase of the inquiry; for if such warranties are usual and customary in the sale of iron safes, then even a prohibition of such authority to the agent would amount to nothing, unless knowledge of such prohibition was carried home to the purchaser before the sale was consummated. So, if the published descriptive pamphlet with which the agent was furnished, tended to disclose what classes of safes were and what were not represented as burglar-proof, and such pamphlet was exhibited to the purchaser pending the negotiation, then that pamphlet should have been allowed to go the jury, as shedding some light on the controverted question of warranty *vel non*.

The charge of the court, given in this case, was in writing, covering all the points deemed material by the presiding judge. It is a continuous thing, and not divided into separate charges. Many of its utterances are free from error, because they assert plain and uncontroverted principles of law. This general charge covers six folio pages, and the only exception to it is in the following language: "To each of which the defendants excepted." This must be treated as a general exception to the whole charge, and under our rulings, must be disregarded, unless the whole charge is erroneous. A portion of it, at least, being free from error, the appellant can take nothing by this assignment of errors. *Jacobson v. State*, 55 Ala. 151. So, the three charges given at the request of the plaintiff below are each free from error.

Against the objection and exception of defendants, the plaintiff was permitted to testify as follows: "If I had known the real thickness of the iron of the safe, I would not have risked my money in it as I did." This was simply proving a reason or motive, not communicated, for doing the act which resulted in the loss of the money. Plaintiff could have testified as a fact that he had no personal knowledge of the thickness of the iron until after the safe was hewn open, and that he confided in the representations of Stewart as to its thickness and hardness. The jury then, if they believed this testimony, would have drawn their own inferences, as to whether the plaintiff would or would not have risked his money in the safe, if he had known the true thickness and temper of the metal. This was eminently a function of the jury. But witnesses, particularly parties, should not, as a rule, be allowed to testify to secret, uncommunicated motives of their own conduct. *Clement v. Curreton*, 36 Ala. 120; *Gibson v. Hatchett*, 24 id. 201; *Jones v. Hatchett*, 14 id. 743; *Goodman v. Walker*, 30 id. 482; *Whetstone v. Br. Bank*, 9 id. 875.

The demurrers also raise the question of the right to recover for the money and watch alleged to have been taken from the safe. The appellant contends these damages are too remote. The doctrine of this court, affirmed in many cases, is, that "the damages which are recoverable must be the natural and proximate consequence of the act complained of." 1 Brick. Dig. 522, §§ 8, 9, 10; *Burton v. Holley*, 29 Ala. 318; *Ivey v. McQueen*, 17 id. 408. It is said that the question of the extent of recovery on a breach of warranty has been much discussed of late, and the tendency of modern decisions

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is, to extend the right of recovery to all the consequences of the breach, where there is fraud in the representation, or stipulation. And in many cases it has been held, that when a manufactured article is sold for a known specific use, and it is not reasonably fit for the purpose, the right to damages goes beyond the bounds which limit the responsibility for an ordinary breach of warranty, and includes compensation for the mischief resulting from the failure of the article warranted, to answer the special purpose to which it is applied. And this doctrine has been sometimes applied in the sale of articles other than manufactured goods. In the case of *Randall v. Roper*, E. B. & E. (Q. B.) 84, seed barley had been sold, and warranted to be "Chevalier seed barley." The barley was sown, and proved to be an inferior and less productive variety of barley. The barley received was less valuable by 15£. than the same quantity of chevalier seed barley would have been; but it was proved that the purchaser lost in the yield of his crop, by reason of the difference, the sum of 261£. 7s. 6d. It was held that the loss in the yield was the natural result of the breach of warranty, and the plaintiff had judgment for that sum. So, in *Borradaile v. Brunton*, 8 Taunt. 535, a chain cable had been sold as a substitute for a rope cable of sixteen inches, and warranted to last two years. A link of the chain broke within the two years, by which the chain and the anchor were lost. The recovery was for the value of both the chain and the anchor, Chief Justice DALLAS remarking, "the holding of the anchor by the cable is of the essence of their warranty." In the case of *Mullett v. Mason*, L. R., 1 C. P. 559, a cattle dealer had sold a cow, and fraudulently represented she was free from infectious disease, when he knew she was not. The purchaser placed the cow with five other cows, who contracted the disease and all died. *Held*, that the purchaser was entitled to recover the value of all the cows as damages. The court said: "The defendant is liable for all the direct consequences of the plaintiff treating the cow as if it was free from any infectious disease, and placing it, as he naturally would, with other cattle, and the death of the other cows was a direct consequence of his doing that." Speaking of this case, and of the rule of damages in such cases, Mr. Benjamin, in his work on Sales, § 904, says: "The damages recoverable by the buyer for a breach of warranty may be greatly augmented when they are the consequence of a fraudulent misrepresentation by the vendor." And the following authorities are to the same effect: *Kingsbury v. Taylor*, 29 Me. 505; *Emerson v.*

Brigham, 10 Mass. 197; 6 Am. Dec. 109; *Stone v. Dermv*, 4 Metc. (Mass.) 151; *Winz v. Morrison*, 17 Tex. 372. So in *Passinger v. Thorburn*, 34 N. Y. 634, it was ruled that "where the defendant sold cabbage seed, and warranted the same to produce Bristol cabbage, which warranty was untrue, the damages would be the value of a crop of Bristol cabbages, such as ordinarily would have been produced that year, deducting the expense of raising the crop, and also the value of the crop actually raised therefrom." In delivering the opinion of the court, DAVIES, C. J., said: "The damages (on breach of warranty) must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation." Further on he said: "In the present case it cannot be doubted that the damages which the plaintiff has sustained are such as arise naturally from the breach of the defendant's warranty. His engagement was that the seed he sold was Bristol cabbage seed, and would produce Bristol cabbages. It may therefore have been reasonably supposed to have been in the contemplation of the parties that if the seed was not Bristol cabbage seed, and would not consequently produce Bristol cabbages, that damage would necessarily accrue to the plaintiff, and would be a natural consequence of such breach. The jury have so said in this case, and we think they came to a correct conclusion." The case of *Flick v. Wetherlee*, 20 Wis. 390, presented substantially the same question, and was ruled in the same way. Each of these cases arose on warranty, without any imputation of *scienter*, *suggestio falsi*, or *suppressio veri*. Fraud cut no figure in them; but it was ruled that the damages complained of and recovered must have been within the contemplation of the parties. And it is certainly true that in each of the cases last cited the injury or damage for which the recovery was had was the direct, known result of the absence of the quality the commodities were warranted to possess. See, also, *White v. Madison*, 26 N. Y. 117.

Some well-considered cases take a distinction between cases of mere breach of warranty and cases of fraudulent representation of qualities not possessed, or fraudulent concealment of known unfitness for the service the seller knows the buyer has in view in making the purchase. In *Bluett v. Osborne*, 1 Stark. 384, a bowsprit was sold, which, at the time, appeared to be sound, but was in fact rotten. Consequential damages were claimed, going beyond the

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mere value of the bowsprit, if it had been sound. The court, Lord ELLENBOROUGH, said: "No fraud is complained of, but the bowsprit turned out to be defective upon cutting it up." And he ruled that the measure of recovery was the value of the bowsprit if it had been sound. In the case of *Maynard v. Maynard*, 49 Vt. 297, the seller knew of the defect in the animal, and fraudulently concealed it. The action was case for the deceit. Large consequential damages were recovered. The principle of the decision is correctly stated in the head note as follows: "Plaintiff, in purchasing a bull of defendant, informed him that he wanted the bull to put with his cows, but did not ask him whether or not the bull was suitable for that purpose. The bull, though sound in appearance, was, to the knowledge of the defendant, without the power of propagation. Defendant did not disclose his knowledge of that defect, but otherwise used no means to conceal the defect, or in any way to mislead or deceive plaintiff. * * Held that plaintiff might show that his cows, on account of not having been gotten with calf, produced less butter than they had been accustomed to produce."

The case of the defective cable above is one of extreme, if not of questionable application of principle. So, in *Brown v. Edgington*, 2 Man. & Gran. 279, the doctrine was carried to extreme results. A wine merchant had ordered a crane rope from a dealer, who represented himself as a manufacturer of ropes, and notified the dealer, who took the dimensions, that the rope was wanted to raise pipes of wine from the cellar, and that it must be adapted to that use. In fact, the dealer procured the rope to be made by another, but this fact exerted no influence in the cause. The rope proving defective, parted in the act of hoisting a pipe of wine, by which the wine was lost. The recovery seems to have been not only for the defective rope, but for the value also of the pipe of wine. The court held that "where a contract is, expressly or impliedly, to furnish goods of a particular description, a warranty is created that they shall be of that description." Nothing was said, either in the argument of counsel, or in the opinions of the judges, on the question of the loss of the wine being too remote, to justify a recovery therefor. It should perhaps be observed that in all these cases, except *Mallett v. Mason*, the injuries resulted directly from the known use for which the articles were procured, without extraneous interference or adventitious circumstances, and purely from inherent defects or inaptness

for the service required. They were the natural consequence of the falsity of the warranty. In a note to Sedgwick on Damages, (4th ed.), pp. 334-5, it is said: "By the doctrine of the late decisions, when for the want of a certainly defined, existing and intrinsic quality which an article sold is warranted by the vendor to have, consequential damages naturally ensue as the direct result of its application by the vendee to the purpose for which he intended it, and the vendor knew he intended it, the vendor is liable for such damages." See, also, *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13.

In the cases of *Kingsbury v. Taylor*, *Emerson v. Brigham*, and *Stone v. Denny*, *supra*, the measure of recovery was stated to be materially affected by the good faith or fraud of the seller. In cases of breach of warranty, untainted by bad faith, the measure of recovery is limited to compensation for the natural and proximate consequence of the failure of the commodity sold to come up to the warranty, uninfluenced by adventitious circumstances, and can only include the consequences which were reasonably within the contemplation of the parties when they made the contract. In the present case, if there was no fraud or bad faith in the sale, the proper measure of damages is the difference between the value of the safe as it was, and what it would have been worth if it had been as represented. This alone is the natural, proximate consequence of the breach; this alone can reasonably be presumed to have been within the contemplation of the contracting parties. To go beyond this, would be to give to a contract or warranty all the attributes of a contract of insurance. The two contracts are very different in their scope and obligations, and contemplate very different consequences from their breach. The *nisi prius* case of *Sanborn v. Herring*, reported in Am. L. R. (N. S.), p. 457, presented very nearly the same controverted questions, and the same conflict of testimony as are found in this record. The case resulted in a verdict for the defendant, doubtless on a failure of the jury to find fraud or bad faith in the seller. The very similar case of *Walker v. Milner* was tried in London, about the same time, before Lord C. J. COCKBURN, but we have no access to a report of that case. In an able note to the American case, reviewing both trials, is the following language: "An undertaking against all possible force and skill of all future burglars, is so much more like a contract of insurance than one of warranty, that we doubt whether such an undertaking would ever

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be held by the courts to be created by general words of warranty. A warranty has reference generally to the character and qualities of the thing warranted, not to the acts of third persons. But a contract of insurance does provide against perils of robbers as well as perils of the elements. A contract of insurance, however, implies a premium paid for the risk assumed, in proportion to the amount of the risk, and also a fixed term of insurance. All these elements were wanting in the contracts of warranty set up in the cases before us. There is great force, however, in the position that a manufacturer who sells a safe, as a fire-proof or burglar-proof safe, thereby represents that its securities against fire or burglary are as complete as the experience of those engaged in the business can make them. But it also follows that as soon as the warranty is construed as one, not of absolute, but only of comparative security, then the manufacturer is let in to show that the purchaser can only ask as much security as he is willing to pay for.

In the English case, there does not appear to have been any point raised as to the measure of damages. Both court and counsel seem to have assumed that if the plaintiff was entitled to recover, he was entitled to recover the value of his lost property — £6,000. This point, however, would appear to have been sharply contested in the case in New York, and the plaintiff's counsel did not claim he was entitled to any thing more than the difference between the value of the safe purchased and that of such a safe as the representations entitled him to, unless the jury found a fraudulent warranty by defendants. * * * The general rule is, that the parties are deemed to contemplate such damages as the creditor may suffer from the non-performance of the obligation *in respect to the particular thing* which is the object of it, and not such as arises collaterally. The damages may be enhanced, it is true, where the conduct of the party in fault has been fraudulent, where property has been sold for a particular use, and in other cases, but we know of no case where, for a breach of warranty, damages have been held recoverable, so far in excess of the amount involved in the original transaction, as the damages claimed in these actions."

The fraud which would justify a recovery in this case commensurate with the value of the goods lost from the safe would not be the mere assertion that the safe was burglar proof, or would resist the assaults of burglars for any specified time. That may have been the expression of an opinion honestly entertained. Integrity

of purpose and fraud do not co-exist. Bad faith is necessary to maintain the claim to the larger damages. To make good this feature of the claim, there must have been an assertion as fact of that which the seller knew to be false, or a reckless, false affirmation that the safe was burglar-proof, when the seller did not know whether the assertion was true or not, or a knowledge on the part of the seller that the safe was not burglar-proof, and a failure to communicate that knowledge, when he knew the purchaser was contracting for the safe as burglar-proof; and the purchaser must have trusted these representations, and been misled by them. One of these categories must be shown, to entitle the plaintiff to the larger damages claimed.

The sale in this case was made by an agent, and the suit is against his principal. We have above laid down the rules for determining whether the act of the agent in this case is the act of the principal. Even if it should be shown that the agent was authorized to warrant the safe as burglar-proof, this would not conclude the principal, unless one of the forms of fraud above described can be carried home to the principal, thus making him a guilty participant in Stewart's fraud, or unless it be shown that the principal, with a knowledge of the fraud perpetrated by the agent, received and retained the fruits of such fraudulent sale. Any thing short of this will leave the liability to account on the agent alone.

The first and second counts of the complaint are sufficient, for they charge on the defendants themselves, knowing an intentional misrepresentation in making the sale, that the safe would resist for twelve or twenty-four hours the most skillful attempts of burglars to enter it. The third count has the further defect that it fails to connect appellants with the alleged fraud of the agent.

Reversed and remanded.

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NATIONAL COMMERCIAL BANK OF MOBILE V. MAYOR, ETC., OF
MOBILE.

(62 Ala. 284.)

National banks — taxation — remedy for illegal.

The assessment by a municipal corporation of a tax upon the shares of a National bank in gross, or upon its capital stock, is void,* but the remedy is at law, and not by injunction, although the municipal corporation is insolvent.

BILL to enjoin the collection of a tax by the city of Mobile. It was alleged that the city was insolvent. The opinion states other facts. The chancellor dismissed the bill.

J. Little Smith and John F. Taylor, for appellant.

William G. Jones, contra.

MANNING, J. The main question — one that has been ably and strenuously argued in this case — concerns the validity of a taxation by the city of Mobile against appellant, the National Commercial Bank of Mobile, of a certain *per centum* upon the amount (\$350,000) of its capital, appellant being a “National banking association,” under the act of Congress “authorizing, providing for the establishment of, and regulating such institutions.”

It is through them, called generally “National banks,” that the “National currency,” payment of which is guaranteed by the general government, is emitted and kept in circulation. The notes of which this currency consists, designed, engraved, stamped and numbered with the purpose of preventing them from being counterfeited, are obtained from the government by the National banks, upon their depositing, in exchange for them and as security for their payment, interest-bearing bonds of the United States, to an amount exceeding by ten *per centum* that of the notes received. The amount of the bonds thus used and deposited by any bank must not be less than one-third of its capital, and is generally a much larger proportion, often the whole of it; and those bonds,

*See *Sumter v. National Bank of Gainesville*, post.

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being securities of the United States for money borrowed, are not subject to State or municipal taxation.

The statutes relating to these banks, after enacting that "in lieu of taxes to the United States, every association shall pay to the treasurer, * * * * a duty of one-half of one *per centum* each half year upon the average amount of its notes in circulation, and a duty of one-quarter of one *per centum* each half year upon the average amount of its deposits, and a duty of one-quarter of one *per centum* each half year on the average amount of its capital stock beyond the amount invested in United States bonds,"—further provide, that "nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by the authority of the State within which the association is located; but the legislature in any State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking associations owned by non-residents of any State, shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed." Rev. Stat. U. S., §§ 5214, 5219.

Upon a careful reading of this law, it will be observed that these associations, the National banks, are themselves, in their corporate capacity, expressly declared to be subject to impositions for the public revenue, in two cases only; first, in favor of the United States, by the duties to be paid to the treasurer, from which it seems intended that the amount they have invested in United States bonds shall be exempt; and secondly, in favor of each State upon their real property therein, according to its value. Their liability to this tax upon their real estate was probably conceded in deference to the opinion hereinafter cited, of the Supreme Court, delivered by Chief Justice MARSHALL, concerning the sovereign rights remaining in the States over the property within their jurisdiction.

The statute does not, in words, inhibit a State from imposing a

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tax against the National banks within its borders, on their capital, or any thing else belonging to them ; but by expressly recognizing the right of State taxation against them, upon their real estate only, and by providing for such tax against the shareholders of the banks upon the value of the shares they may respectively own, it seems to be implied that this is as far as a State may lawfully go in subjecting these associations to such burdens, and the only manner in which they can be imposed. Is this a correct conclusion?

The answer to that question, it seems to me, begins in the great case of *McCulloch v. Maryland*, 4 Wheat. 316-437, decided six years ago. An act of that State made it highly penal for officers of any branch bank, that might be established therein without its authority, to issue notes of such bank to circulate as money, except upon stamped paper to be furnished by the State, and for which it charged a heavy tax ; and McCulloch, cashier of a branch in Baltimore of the bank of the United States, was prosecuted for issuing there the notes of this bank in violation of that law. Webster, Pinckney, and other lawyers of the greatest ability, argued the cause ; and the Supreme Court of the United States, through Chief Justice MARSHALL, after a very able discussion, and laying down a rule, with the argument on which it was founded, for determining the subjects that are within the reach of State taxation, declared it to be the unanimous opinion of the court, "that the States have no power, by taxation or otherwise, to retard, impede or burden, or in any manner control the operations of the constitutional laws of Congress to carry into execution the powers of the general government ;" and because this branch of the bank of the United States was an agency or means authorized by a constitutional law, through which that government was executing those powers, the act of Maryland laying the tax was pronounced to be null and void. The chief justice added : "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax, paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State."

The principles of this opinion have been ever since adhered to by the Supreme Court—and have been several times applied in other celebrated cases. In *Osborn v. U. S. Bank*, 9 Wheat. 738, it was,

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upon an elaborate reargument of the subject, explained why the capacity to issue its own notes as a currency, and do the business of a bank of discount, deposit and circulation — faculties which might be exercised by individuals or corporations wholly unconnected with public affairs — was considered essential to the vitality and usefulness of the bank of the United States as a government fiscal agent, and why it therefore was not taxable in respect of the advantage it derived from the employment of those faculties. In *Weston v. City of Charleston*, 2 Pet. 449, a municipal tax upon stock certificates for money obtained by loan, issued by the United States to individuals, and in their hands, was held to be unconstitutional, because it impeded the government in the exercise of its power to borrow money. In 1862, the same principle was reaffirmed and applied in *Bank of Commerce v. City of New York*, 2 Black, 620, in respect to a tax of that city upon the capital of the State banks situated therein, the capital of each being largely invested, in some instances almost entirely, in United States bonds. Again, in the “*Bank-tax case*,” 2 Wall. 200, it was decided that a tax of the State of New York on the banks there, “on a valuation equal to the amount of their capital stock paid in, or secured to be paid in,” was a tax on their property, and that so far as it consisted of stocks of the Federal Government the law laying the tax was void. And in *Farmers’ National Bank v. Dearing*, 91 U. S. 29; Thomp N. B. Cas. 117, the Supreme Court say: “The National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. * * *

Against the National will, ‘the States have no power, by taxation or otherwise, to retard, impede or burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.’”

Whatever evil, therefore, in the overthrow of State policies, especially in regard to usury, may be apprehended as possible from the unrestrained exercise of such power by the Federal government, it appears to be very positively settled by the Supreme

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Court that a State has no independent authority of its own over the National banks within its borders, as they are now endowed; they being created and employed by Congress as instruments and agencies in the administration of public affairs; and that inasmuch as by taxing them directly their efficiency and usefulness might be impaired, the several States have no power to lay any burden of this kind upon them, except so far as Congress has made them liable to such jurisdiction, or property belonging to them was previously subject thereto.

What that body has enacted in this regard is, that "all the *shares* in any association" may be "included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by the authority of the State within which the association is located," and that "the legislature in any State may determine and direct the manner and place of taxing all *the shares*," subject to two restrictions not affecting the argument. And the act further makes it the duty of the president and cashier of every banking association to "cause to be kept, at all times, a full and correct list of *the names and residences of all the shareholders* in the association, and of the *number of shares* held by each, in the office where the business is transacted," and subject to the inspection of "the officers *authorized to assess taxes* under State authority — during business hours."

But the city of Mobile made the assessment now in question, not against any of the shareholders, but against the bank itself, upon all "complainant's shares in gross, composing its capital stock" (see paragraph two of answer); or as the exhibits to the bill show, upon its "capital, \$350,000." And it is urged that inasmuch as the capital is composed of the shares, and the shareholders constitute the corporation, a tax upon the capital, or all the shares of the capital in gross, against the corporation itself, is in legal effect the same as a tax against the shareholders severally upon their respective shares. And it seems, indeed, as if there should be practically little difference between the two. Yet Congress, by providing that all the shares of the capital may be included in the valuation of the personal property of their owners or holders for State taxation, and by requiring to this end written or printed lists to be kept for inspection by the tax officers of the names, places of residence and number of shares of these share-

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holders, appears carefully to have avoided subjecting the banks themselves to State taxation of their capital.

The reasons for this probably were — first, a desire to prevent any such interference with these instrumentalities for administration, as the old Bank of the United States encountered; and secondly, views of the subject similar to those on which the decision in *Van Allen v. Assessors*, 3 Wall. 573; Thomp. N. B. Cas. 1, is founded. It is there held that the capital of a National bank belongs to it only in its corporate capacity, not to the stockholders, and that as it consists largely, and often wholly, in United States bonds, by taxing the capital as such, these bonds would necessarily be taxed, which cannot in any case be permitted. But the shares, it was further held, of the several shareholders, which the law declares may be included in the valuation of their personal property in the assessment of taxes imposed by or under State authority — although their value may be largely influenced by the new use which the banks were thereby authorized to make of the bonds — did not consist of the bonds. Said Mr. Justice NELSON, for a majority of the court: “The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.” “The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital,” etc. “This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to State taxation under the limitations prescribed.”

And as a reason why this taxation should not be regarded as a tax upon the bonds in which the capital of the bank was invested, and why no deduction should be made on account of them, the learned judge referred to the privileges and powers conferred by the act — “founded upon a new use and application of these government bonds — especially the privilege of issuing notes to circulate in the community as money, to the amount of *ninety per centum* of the bonds deposited with the treasurer; thereby nearly doubling their amount for all the operations and business purposes of the banks.” Wherefore, it was held that the tax was prop-

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erly authorized upon the shares, in respect of these new privileges, and the advantages they conferred upon the shareholder in the increased value he derived therefrom. It might also have been added, that the capital of a bank is generally a fixed sum which does not change; while the shares thereof, in the hands of the shareholders, vary in value according to the condition of its affairs; and the rule now generally enforced by constitutional and legislative enactments is that all taxes shall be in proportion to the value of the subject on account of which they are assessed. In *People v. Commissioners*, 4 Wall. 244; Thomp. N. B. Cas. 9, the views presented in the above leading case were reaffirmed; also in *Bradley v. People*, id. 459; Thomp. N. B. Cas. 19, and in other cases since.

According, therefore, to the terms of the act of Congress and the decisions of the Supreme Court of the United States, the taxes brought into discussion in this cause were not assessed in conformity with or by authority of law.

The defects, however, and errors were rather in the mode of proceeding than in the matter of right. There is no doubt that the shares of the stock in National banks may be lawfully included in the valuation of the personal property of the owners thereof, in assessing taxes imposed by authority of the State, and are as such liable according to their value, to the county and municipal, as well as to State taxes, in the counties, cities and towns in which the banks are respectively located, provided such taxes shall not be heavier than those imposed upon other moneyed capital. Moreover, the president and cashier of every such bank are required to have made out and kept, at all times, in its office for the transaction of business, a list of its shareholders, their places of residence, and of the number of their shares respectively; and it may be made the duty of every such bank to pay for its stockholders the tax legally assessed against their respective shares, whether the stockholders reside in the State of Alabama or not. Contestations upon these points have been made time and again, sometimes by the banks and sometimes by the shareholders, to avoid this liability. But it is established by repeated adjudications, and ought to be considered definitely settled. See upon the subject, *Van Allen v. Assessor*, *supra*; *People v. Commissioners*, *supra*; *National Bank v. Commonwealth*, 9 Wall. 353; Thomp. N. B. Cas. 34 (an interesting case); *Tappan v. Merchants' National Bank*, 19 Wall. 491; Thomp. N. B. Cas. 100; *People v. Commissioners of Assessments*,

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94 U. S. 415 ; *Waite v. Dowley*, id. 527 ; Thomp. N. B. Cas. 137 ; *Adams v. Nashville*, 95 U. S. 19 ; Thomp. N. B. Cas. 148 ; *McIver v. Robinson*, 53 Ala. 456 ; Thomp. N. B. Cas. 372.

It is insisted, however, on behalf of the city of Mobile, that even if the taxes in controversy are illegal, or illegally assessed, complainant's remedy is not in a court of equity by injunction. This is certainly in accordance with our decisions heretofore. The allegations of insolvency against a municipal corporation, which rarely has much property of its own subject to execution, have not the same force as they would have against an individual or private trading corporation. Bodies politic of this public character, established for the local government of communities, raise their revenues, as a State does, by taxation of the people and property within their jurisdiction. Obstructions to the exercise of this right and refusal to pay taxes are often the chief cause of municipal embarrassments. The averments of the insolvency of the city cannot be regarded as affording a sufficient reason why a Court of Chancery should take jurisdiction of a case of this nature, for which there were ample remedies at law, including especially proceedings by *certiorari*.

Let the decree of the chancellor therefore be affirmed.

Decree affirmed.

BRICKELL, C. J. I concur in affirming the decree of the chancellor, upon the ground that a court of equity has not jurisdiction to enjoin the collection of the tax. I do not concur in much that was said in reference to the taxation of the shares in National banks.

BUCKALEW V. STATE.

(62 Ala. 334.)

Criminal law — lottery.

Where several persons put money in equal amounts upon a round board numbered around the rim, and each in turn whirls a hand fastened in the center, the one at whose whirl the hand registers the highest number on the rim of the board taking all the money on the board, the owner of the board sometimes putting up money, and sometimes charging a small sum, to be paid by the winner, for the use of the board ; this does not constitute a lottery.*

* See *Wilkinson v. Gill* (74 N. Y. 63); 30 Am. Rep. 264.

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CONVICTION of setting up and carrying on a lottery. The evidence was that "the defendant had a mill, and in the mill-house, on the head of a flour barrel, he had what the witness called a board, on which were marked, in a circle, figures from one to forty-eight, with a heart in the center, fastened on a pivot with a point or hand pointing to the numbers, and could be made to rotate or turn; that parties were in the habit of putting down money, each putting down the same amount, and then each would whirl the heart, and the one on whose whirl the finger or hand on the heart stopped pointing to the highest number, won all the money; that the defendant sometimes put down money as one of the players, and that for the last few days that the same was played on, the defendant charged a nickel for the use of the board, to be paid by the one winning." The court charged that if the jury believed this, the defendant was guilty.

W. H. Barnes, for appellant.

Henry C. Tompkins, attorney-general, *contra*.

STONE, J. Lottery is a distribution of prizes by lot or chance. Web. Dict.; Bouv. Law Dict. There are said to be two kinds of lottery in general use. One, the Genoese, or numerical system; sometimes called the combination plan. The other, the Dutch, or class lottery; sometimes called the single number plan. American Cyclopædia. In each, chances are purchased, generally by the purchase of tickets, or fractions of a ticket. Not necessary, however, that tickets should be issued. Wherever chances are sold, and the distribution of prizes determined by lot, this, it would seem, is a lottery. This, we think, is the popular acceptation of the term. We judicially know what constitutes a lottery. *Solomon v. State*, 28 Ala. 83. According to the testimony in the present record, it cannot, with any propriety, be said that chances were sold, or prizes won or drawn. In fact, nothing was sold. The entire theory of the game was, that several or many persons contributed equal sums to a common purse, which was awarded to the contributor whom chance so favored, as to register for him the highest number. In its result, it resembles what is known in horse-race parlance as sweepstakes; or a raffle, determined by the fall of dice. We do not think the proof established a case of lottery, or sustained the indictment. Code of 1876, § 4445. [Omitting other considerations.]

Reversed, but not remanded. Let the defendant be discharged.

Judgment reversed.

WRIGHT V. PAINE.

(63 Ala. 340.)

Receipt — "for safe-keeping" — "on deposit to be paid" — limitation — laches in demand.

In the absence of any explanatory evidence, an instrument signed by a depositary, by which he acknowledges that a third person has deposited with him for "safe keeping" a certain number of dollars in gold coin, which the depositary is to "return whenever called for," will be held a special deposit.

In the absence of any explanatory evidence, a writing by which the depositary acknowledges to have received a certain number of dollars in gold "on deposit, to be paid" to the depositor "on demand" — will be held a contract for loan of money, payable presently or on demand; and the statute of limitations will begin to run against it from the date of the writing.

Where a special deposit of coin was made for safe-keeping, and more than seventeen years elapsed, the death of the depositary intervening more than two years before suit was brought, and eleven years elapsed after the deposit before demand was made for its return, the delay, in the absence of explanation, was unreasonable and conclusive against a recovery.

ACTION by Wright, as administrator of William O. Winston, deceased, on the following receipts :

"Deposited with me, for safe-keeping, by William H. Wright, eight hundred and five dollars (\$805) in gold, which I am to return whenever called for, this 4th day of November, 1857.

(Signed)

WM. O. WINSTON."

Indorsed:

"Presented for settlement, April 20, 1872.

J. N. WINSTON, Adm'r of estate of WM. O. WINSTON."

"Received, January 25, 1858, of Wm. H. Wright, forty dollars in gold, on deposit, to be paid by him on demand (\$40).

(Signed)

W. O. WINSTON, per J. N. WINSTON."

The first receipt was presented to the administrator April 20, 1872. There was evidence of a demand on Winston in 1869. The court of its own motion, charged the jury: "1. In the case of a deposit of money in gold, silver, or bank notes, which are called and pass

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as money, the relation of creditor and debtor exists — and this whether the deposit is proven by verbal or written evidence. 2. When a deposit of money is made, the law implies the promise to return or repay it on demand, and an express promise, either verbal or written, is nothing more, and makes the legal obligation no greater or stronger. 3. Upon a deposit of money, returnable or payable on demand, a right of action, or right to sue, immediately, attaches. 4. The statute of limitations commences to run as soon as the right of action accrues or commences. 5. In this case the statute of limitations of six years, if pleaded, is a bar to the plaintiff's recovery, if six years have elapsed from the date of the receipts before the suit was brought, and in computing the time you must not count the time from January 10, 1861, to September 23, 1865, four years, eight months and thirteen days. 6. A different rule exists in relation to personal property, other than money; for instance if one deposited a horse with another, to be returned on demand, then the statute would not begin to run until demand made. But money is a peculiar species of personal property, in regard to which a different rule prevails, as I have above stated." The plaintiff requested the following charges: 2. That under said receipts, the plaintiff had no right of action until demand made by Wright of Winston for the money. 3. That the statute of limitations did not begin to run until after demand made. These charges the court refused. There was judgment for the defendant.

W. J. Haralson and Bragg & Thorington, for appellant.

M. J. Turnley, contra.

BRICKELL, C. J. "In the ordinary cases of deposits of money with banking corporations, or bankers, the transaction amounts to a mere loan or *mutuum*, or irregular deposit, and the bank is to restore, not the same money, but an equivalent sum, whenever it is demanded." Story on Bailm., § 80; *Wray v. Tuskegee Ins. Co.*, 34 Ala. 58. It is insisted for the appellant, there is a distinction between a deposit with banks or bankers, and with an individual not engaged in banking. While a deposit with the one, not expressed, or shown by circumstances to have been a special deposit, will from the nature and character of the business of the depository, and its usual course, be regarded as general, creating the relation

of debtor and creditor — a deposit with the other will be presumed, in the absence of evidence to the contrary, as special, creating only the relation of bailor and bailee. The authority which is relied on to support the proposition does not seem to assert it so broadly. The evidence of the deposit in that case, and of the agreement between the parties, was verbal, and it was shown that they stood in the relation of employer and overseer, the latter depositing bank notes with the former for safe-keeping. The relation of the parties, the expressed purpose of the deposit, the fact that the depositary was not engaged in any commercial business, were circumstances which the court held were proper for the consideration of the jury, in determining whether the deposit was general or special. *Duncan v. Magette*, 25 Tex. 246. Beyond this we do not understand the decision to extend, and to this extent it is consistent with our own case of *Derrick v. Baker*, 9 Port. 362. But neither case asserts that the character of business in which the depositary may be engaged necessarily determines the character of the deposit.

Contracts, verbal or written, are interpreted in the light of the circumstances surrounding the parties, and their relations to each other when they are formed. These circumstances and relations often aid materially in ascertaining the intention of the parties, and when the character of the contract is uncertain, when its expressions are inapt, may enable the court more satisfactorily to determine what are the obligations it imposes or the rights it confers. If there was nothing more in a transaction resting entirely in parol, than that a farmer, having money, should deposit with a neighbor engaged in the like and no other pursuit, or in no business requiring the frequent use of money, and the deposit was expressed to be for safe-keeping, the jury within whose province it would lie to determine whether the deposit was general or special, would probably conclude that it was special, that the purpose of the depositor was the safe-keeping of the money, and the duty and liability of the depositary was to keep safely. But if the depositary was a merchant, whose business required the frequent use of money, and he was in the habit of receiving money on deposit, there would be more hesitation in pronouncing the deposit special — that the depositary could not use the money — that the title to it remained in the depositor, and if it was lost, he must bear the loss, unless fraud or gross negligence could be imputed to the depositary.

The transaction between these parties does not rest in parol —

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the contracts are in writing, and if the circumstances under which they were made, the relations then existing between the parties, or any other extrinsic fact which could properly be considered, would aid in determining the character of the contracts, no evidence has been given of them. The construction they must bear, depends wholly on the terms in which they are expressed.

The first in point of time expresses a deposit of a certain sum in gold, and that the purpose is for safe-keeping, and that it is to be returned whenever called for. The gold is not shown to have been in a sealed package, in a bag, or in a box or chest, nor marked so as to be capable of being separated from other like coin, and of identification, nor is the character or denomination of the coin stated. The promise is unconditional, to return it whenever called for—there is no contingency provided by the contract, in which obedience to this promise can be excused. If the transaction was with a bank, banker, or a dealer in money, or with a merchant, or other person engaged in business requiring the frequent use of money, and in the habit of receiving money on deposit, the presumption would be, probably, that the writing implied a general, not a special deposit. Such a deposit would be most advantageous to the depositor—the gold would cease to be his property, and if lost by any casualty, whatever may have been the diligence of the depositary, the obligation to repay it in kind would be absolute. The presumption would also be consistent with the course and usages of business. *Dawson v. Real Estate Bank*, 4 Pike (Ark.), 297; *Foster v. Essex Bank*, 17 Mass. 477; 9 Am. Dec. 168; *Com. Bank v. Hughes*, 17 Wend. 94. The writing expressing that the purpose of the deposit was safe-keeping would scarcely be sufficient to repel the presumption. But we are without the aid of evidence of the character of the business in which the depositary was engaged, or of any extrinsic fact which would aid in the construction of the writing. Every clause and word of a contract must have assigned to it some meaning, if possible, and it is not to be presumed parties have deliberately or carelessly employed idle, unnecessary, or unmeaning words and expressions. Construing the instrument by its words alone, we conclude that the safe-keeping of the gold was the purpose of the deposit, and the duty imposed was safely to keep, and to return it *in individuo* when demanded. The deposit was therefore special, not general.

The other writing is in form of a receipt and expresses that the

gold is payable on demand. The only duty imposed is the payment on demand. There is not, as in the former writing, an express agreement to keep safely, nor any words which are inconsistent with a loan, payable on request. That the money is stated to be received on deposit, was most probably intended to indicate that it was not a loan bearing interest. Giving due significance to all the words of the writing, and that its terms import a payment, not a return of the identical money, the contract is not a bailment, but a loan of money, payable presently or on request — a written promise for the payment of a certain sum of money, absolutely and unconditionally, imposing no other duty or obligation than payment, is a promissory note. *Woolford v. Leslie*, 2 Nott & Mc. 575. A promissory note, or other writing for the payment of money on request, or presently, or on demand, is subject to the statute of limitations and the bar of the statute is computed, not from the day of demand, but from the date of the note or writing. Ang. Lim., § 95; *Owen v. Henderson*, 7 Ala. 641; *McDonnell v. Br. Bank*, 20 id. 312; *Kimbro v. Waller*, 21 id. 376. In all its material features, the writing we are construing is not distinguishable, in legal effect, from that which was considered in *Owen v. Henderson*, *supra*, and held from the day of its date, within the operation of the statute of limitations. Adhering to that decision, we must pronounce that the action, so far as founded on this instrument, was within the bar of the statute. The oral declarations made by Winston in 1869, if clearly proved, and if regarded as an unqualified admission of an existing liability, embracing the last instrument, which he was willing to pay, would not remove the bar of the statute or prevent it from attaching subsequently. The bar of the statute can be avoided only by a partial payment made before the bar is complete, or an unconditional promise in writing. Code of 1876, § 3240.

As to the other instrument, creating the relation of bailor and bailee, and not that of debtor and creditor, it may be conceded that in the absence of circumstances excusing it, a demand, or something equivalent to it, was a condition precedent to an action founded on it. The demand is for the protection of the bailee, and to save him from the vexation of suit when he may not be in default. When a demand is essential as a condition precedent to an action, it must be made in a reasonable time. The party bound to make it cannot postpone it indefinitely, and by his procrastination keep alive claims that would otherwise become dormant and

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grow stale, the enforcement of which would be offensive to the policy of the law and dangerous to the rights of his adversary. In the case of *Codman v. Rogers*, 10 Pick. 119, it was said by WILDE, J.: "Generally, where a debt is payable in money and on demand, the statute of limitations begins to run immediately after the debt is contracted; but if a demand previous to the commencement of an action is necessary, the statute will not begin to run until a demand is made. But in the latter case there must be some limitation to the right of making a demand. A party must not be permitted to sleep over his rights, to the prejudice of the party on whom he makes a claim, and who by the delay may be deprived of the evidence and means of effectually defending himself. A demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action, and in both cases the same presumptions arise from delay." In the case of *McDonnell v. Br. Bank, supra*, which was an action against the clerk of a court for money collected on a judgment, it was held the action was not maintainable without proof of a demand, or of a conversion, but it was also held the demand must be made in a reasonable time after the collection, to avoid the operation of the statute of limitations. What would be considered a reasonable time, it was said, could not be settled by any definite rule capable of application to all cases, but must depend upon the circumstances peculiar to each case.

If there be any facts or circumstances which can excuse the long delay of the appellant in commencing suit, and in making demand for the money, the record does not disclose them. More than seventeen years elapsed after the special deposit, the death of Winston intervening for more than two years certainly, the precise time not appearing, before suit is instituted. More than eleven years before any demand for its return was shown. It is almost incredible that the appellant should have permitted such a sum to remain so long in Winston's hands without an effort to reclaim it, or an inquiry as to its safety, especially when there is an absence of any fact indi-

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cating any peculiar relation between them, inviting confidence, and the indifference, or security, which it may beget. The demand was made, and nearly six years is permitted to elapse, the death of Winston intervening, before suit is brought, and no explanation of this delay is afforded. It would be a dangerous precedent; it would endanger the estates of the dead; it would render the rights of the living uncertain and insecure; it would open the door for the introduction of stale claims, which it has been well said have often more of cruelty than justice in them; and it would be violative of the policy of the statute of limitations, and defeat the purposes it was intended to accomplish, if without an explanation of the long delay in making demand, and the unwarrantable delay in bringing suit after the fruitless demand, until Winston was dead, the statute was held not a bar. The statute is now affirmatory of the principle of these decisions. It declares: "When a right exists, but a demand is necessary to entitle the party to an action against any officer, agent or attorney, the limitation commences from the commission or omission of the act giving the right of action, and not from the demand." Code of 1876, § 3241.

The instructions given by the Circuit Court may not have been influenced by these considerations, and it may have erred in its construction of one of the writings. The error has worked no injury to the appellant, for the statute of limitations, under the facts, was, in any aspect of the case, a bar to the action, and this was the substance of the instructions given. Whether given for a right or a wrong reason is not material.

The judgment is affirmed.

Judgment affirmed.

SUMTER COUNTY V. NATIONAL BANK OF GAINESVILLE.

(62 Ala. 464.)

National bank — taxation — action against bank for tax on stock.

An assessment upon the capital stock of a National bank in gross is invalid, and a provision that the same "shall be paid by each such association for the shareholders thereof," when dependent upon such invalid provision, and incapable of independent enforcement, is also inoperative, and imposes no duty on the bank to pay such tax.

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ACTION for taxes by Sumter county against a National bank. The opinion states the facts. The defendant had judgment below.

STONE, J. The present complaint contains many counts, but in each one the taxes claimed are averred to have been assessed upon the capital stock of the defendant corporation, by an aggregate or gross assessment. In the case of *Nat. Bank of Mobile v. Mayor, etc., of Mobile*, 62 Ala. 284,* we ruled that such assessment is irregular and invalid, and that the capital stock of a National bank cannot be the subject of State taxation. In the counts of the amended complaint, it is averred that the defendant — the National bank — “according to the statute in such cases made and provided, rendered to the tax assessor of Sumter county a list of property liable to taxation, and included in said list \$100,000 capital stock, the same being the aggregate of all the shares of the stockholders in said bank, the taxes upon which were required, by the statute in such cases made and provided, to be paid by the defendant for the shareholders thereof.” These counts then aver the amount or rate of taxes that was levied by the court of county commissioners for county purposes, and continue: “And by virtue of the premises, the defendant became liable to pay the plaintiff the sum of * * * dollars for taxes as aforesaid; that amount being the amount of taxes due the plaintiff on the aggregate amount of said shares of stock.” The Circuit Court sustained a demurrer to the complaint, and the plaintiff brings the case here by appeal.

It is very true, as stated in the case of *National Commercial Bank v. Mayor, etc., supra*, that the distinction between the capital stock of a bank and the shares of stock in the bank is somewhat technical; the former being but the aggregation of the latter. But it is the difference between the several parts and the whole; between the tributaries and the congregated volume which forms the river; between the several partners and the aggregated partnership; between an artificial entity, called a corporation, having a local habitation and a name, capable of suing and being sued, and which may survive all the shareholders of any given period, and the several owners of the shares, who are commonly real persons, and who may undergo constant change, by transfer or death, without disturbing

* *Ante*, p. 15.

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or affecting the continuance or identity of the corporation. They are, in law, different persons. The policy of denying to the State legislatures the privilege and power to tax the capital stock of National banks, while expressly granting them the right to tax the shares in such corporations, was a question for the Congress of the United States, not for us. Ever since the decision in the case of *McCulloch v. Maryland*, 4 Wheat. 316, it has been steadily maintained that such banking institutions are not subject to State assessment for taxes, except as the Congress may grant the privilege. Hence, it is a question of power conferred; not of policy. That the capital stock of banks cannot be made a subject of State taxation, see *Bank Tax* case, 2 Wall. 220; *Van Allen v. Assessors*, 3 id. 573; Thomp. N. B. Cas. 1; *People v. Commissioners*, 4 Wall. 248; Thomp. N. B. Cas. 130; *Commercial National Bank v. Mayor, etc.*, 62 Ala., 440. Speaking of the distinction between the capital stock of a bank and the shares in such capital stock, Justice NELSON, in *Van Allen v. Assessors*, 3 Wall. 583-4; Thomp. N. B. Cas. 1, says: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder, like any other property that may belong to him. It is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed." For an able discussion of these questions, see Burroughs on Taxation, 120-128.

The act of Congress, which authorizes the States to levy and collect taxes on the shares in National banks, is in the following language, Revised Statutes of the United States, section 5219: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by the authority of the State within which the association is located;

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but the legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in any city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." We think it is difficult to misunderstand the various provisions of this statute. It clearly confers on the several States the power and authority to levy upon the several shareholders in a National bank, located in the State, a tax, subject only to the two named restrictions, and clothes the legislature of the State with power to determine and direct the manner and place of taxing the shares of all such banking associations located in their respective States. It also requires that the shares of non-resident shareholders shall be taxed in the city or town where the bank is located, and not elsewhere. Under this statute it has been rightly held that the State in which the National bank is located has the exclusive right to derive revenue from the shares of such bank, no matter where the shareholders may have their domicile. It is also settled that the legislature of a State may by law make it the duty of the bank to pay taxes thus levied on the shares of the shareholders. *National Bank v. Commonwealth*, 9 Wall. 355; *Thomp. N. B. Cas.* 34.

It is contended for appellant that the case last cited affirms the validity of the levy and assessment in this case, and shows that the present action is well brought. According to our construction of the language of the court in that case, it is perfectly reconcilable with the language of this court in *National Commercial Bank v. Mayor, etc., supra*, and with all the other cases cited. The tax levied in that case by the legislature of Kentucky was in the following language: "On bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or on each one hundred dollars thereof, owned by individuals, corporations or societies." This was clearly a levy of the tax on the shares of the bank, and not on the capital stock. The statute further provided that "the cashier of a bank, whose

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stock is taxed, shall, on the first day of July in each year, pay into the treasury the amount of tax due." Speaking of the section levying the tax, first copied, the Supreme Court of the United States by a unanimous opinion affirming the judgment of the Supreme Court of Kentucky, said: "We entertain no doubt that this provision was intended to tax the shares of the stockholders, and that if no other provision had been made, the amount of the tax would have been primarily collectible of the individual or corporation owning such shares, in the same manner as other taxes are collectible from individuals. It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may, in the market, be worth a great deal more, or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, but the tax is the same in each case. This shows that it is the shares which are intended to be taxed, and not the cash or other actual capital of the bank." In that case the distinction was carefully drawn between the shares of stock in a bank, and the capital stock. The State had demanded payment of the tax from the bank, and being refused, suit was brought and a recovery had. The case is an authority for these propositions. First, that National banks, having stock invested in United States bonds, are not subject to taxation on their capital stock under State authority. Second, that shares in such banks are subject to taxation against the shareholders. Third, that when the State statute authorizes it, the bank may be compelled by suit to pay the taxes so assessed upon the shares; and fourth, in the absence of such legislative direction, such tax is collectible of the shareholders, in the same manner as other taxes are collected from individuals.

It results from what we have said that the act "to restrict the power of taxation," etc., approved February 23, 1875 (Pamph. Acts, 49), so far as it may be supposed to relate to the capital stock of National banks, is inoperative.

Should the tax be levied on the shares of the stock of the bank as we have shown it may be, then the only authority for requiring the bank to pay such assessment is found in subdivision 7, section 369 of the Code of 1876. That section is composed of three paragraphs separated by semi-colons. The first and third of those paragraphs are clearly unconstitutional under the principles declared in

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Mayor, etc. v. Stonewall Insurance Company, 53 Ala. 570. We need not re-state the argument. The second clause refers to the first, is dependent on it, and cannot have an independent operation, the first being swept away. It relates to the tax authorized by the first paragraph, and to nothing else. Having shown that tax to be unconstitutional, the second clause has no field of operation. Its language is "the same," that is, the tax of seventy-five cents on each share of one hundred dollars of the capital stock of every National banking association, to be in lieu of all taxation, State, county and municipal, on such shares, "to be paid by each such association for the shareholders thereof." There is, then, no statute which requires the National banking associations to pay the State on the shares of such associations. It follows that such tax can only be assessed under subdivision 13 of section 362, Code of 1876, and can be collected only as taxes against other individuals are collected. This would work an affirmance of the judgment of the Circuit Court, even if the tax had been assessed against the several shares.

Judgment affirmed.

BRICKELL, C. J., dissenting.

JOHN V. CITY NATIONAL BANK OF SELMA.

(82 Ala. 529.)

Negotiable instrument — notice of protest — mode of giving.

Where the holder and indorser of a draft reside in the same place, the indorser is ordinarily entitled to personal notice of dishonor, but this is excused where the notary, on the day of dishonor, called at the indorser's place of business, during business hours, to give him notice, but found it locked and no one present to receive notice, and deposited the notice, properly addressed, in the post-office on the same day.

ACTION against indorser on a draft. The holder and indorser both resided in Selma. There was evidence that the draft was dishonored, and on the same day, during business hours, the notary, who presented it, went to defendant's office, to serve notice of protest on him, but finding it locked, and no one there, he deposited the notice in the post-office, on the same day, addressed to him. The opinion states other facts. The plaintiff had judgment below.

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W. C. Ward, for appellant.

W. R. Nelson, contra.

STONE, J. When this case came before this court at a former term, the record failed to show that the notary's visit to defendant's office was within business hours. See *John v. City National Bank of Selma*, 57 Ala. 86. In that case the Circuit Court had instructed the jury, as matter of law, that the proof of notice was sufficient. The proof made in that case was, that before sunset on the day on which protest was made, the notary in person carried a written notice of protest to defendant's law office; that he found no one there, and that the law office was closed and locked. Thereupon, without further search for Mr. John, he deposited the notice in the post-office, addressed to Mr. John. This court, after stating that the burthen of proof rested on the holder to show notice, or an excuse for not giving it, added: "If the absence of the indorser from his place of business when it was visited for the purpose of giving him notice, is relied on as an excuse, it must be shown the absence was during hours of business. It is only during such hours it is reasonable to expect to find him there, or any one with whom notice could be left for him. The evidence is very indefinite as to the hour of the day at which the notary visited the office of the indorser. No note of the time seems to have been made; it was in the afternoon of the day of dishonor, and before sundown, according to the recollection of the notary. What were business hours in Selma is not shown; and for aught that appears, the visit may have been at an hour when the notary could not justly and reasonably expect to find the indorser there. The visit may have been made to that office with the bare hope of finding the indorser, and relieving himself from further trouble in giving notice. The residence of the indorser was known, and he was not sought there. Notice on the succeeding day would have been sufficient, yet it was not given; but not finding him at his place of business in the afternoon, and it may have been at an unreasonable hour, notice deposited in the post-office — the mode of notice the least troublesome to the notary — is the resort. When the facts are ascertained, the sufficiency of notice, or of the excuse for not giving it, is a question of law. The Circuit Court erred in holding there was due notice of the dishonor given by the deposit of notice in the post-office; or that the absence of the indorser from his place of business, as it is shown by the

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evidence, was an excuse for the failure to give notice." The substance of what was decided in that case is, that the holder and indorser being residents of the same place — the city in which the protest was made — personal notice of the dishonor was required; and under the evidence disclosed in that record no sufficient excuse was shown why such personal notice was not given. In holding that notice deposited in the post-office was insufficient in that case, this court simply followed many former rulings. *Stevenson v. Primrose*, 8 Port. 155; *Gindrat v. Mechanics' Bank*, 7 Ala. 324; *Greene v. Farley*, 20 id. 322. See, also, *Tyson v. Oliver*, 43 id. 455; *Phillipe v. Harberlee*, 45 id. 597. So, in the second branch of the proposition, this court only followed *Stevenson v. Primrose, supra*. In that case this court said: "To make the excuse available it should have been shown not only that the witness called at the plaintiff's place of business, but it should appear further that the visit was made at a seasonable time, viz., *within the hours of business*." True, in the former opinion in this case, mention is made of the fact that the notary did not call at the residence of Mr. John, and that he did not renew the effort on the next day to find him. The opinion, however, does not declare on what ground the diligence is adjudged insufficient. The failure to show that the call was made within business hours was, as we have seen, fatal to the legal sufficiency of the excuse.

The proof in the present record is different from that in the former one. Witnesses testified *pro* and *con* on the question, what were business hours in Selma; and the question whether the witness' visit was within business hours was fairly submitted to the jury in the charge of the court. The verdict proves this issue was found in favor of the plaintiff. It is, then, an established fact in this record that the notary, on the very day on which the bill was dishonored, and within business hours, called at the office of the indorser to give him notice of the dishonor, and found the office closed and locked, and no one there with whom notice could be left. The exceptions to the charges raise the question, was this sufficient, or should the notary have visited the indorser's residence or repeated the call the next day? In the case of *Crosse v. Smith*, 1 M. & S. 445, notice was sent by a clerk, who, between 10 and 11 o'clock A. M., knocked at the counting-house door of the persons sought to be charged, and found nobody there. Lord ELLENBOROUGH, pronouncing on the sufficiency of this excuse, said:

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"That brings it to the question, whether sending the bill by a clerk, after 10 o'clock, and knocking and waiting at the counting-house door, was sufficient notice in point of law, and we think that it was." He cited and approved Lord ELDON's similar ruling in the case of *Goldsmith v. Bland*, where "the only notice of the dishonor of a bill was by a clerk of the indorsee, who went to the counting-house of the indorser, found the counting-house shut up and no person there; saw a servant girl, who said nobody was in the way, and he then returned without leaving any message." In the case of *Allen v. Edmonson*, 2 Car. & Kir. 547, Baron ROLFE ruled that if "a party send a messenger once, in due time and during the hours of business, to the place of business of another party who is entitled to have notice of the dishonor of a bill, for the purpose of giving such notice, and there be no one there to receive it, that is equivalent to verbal notice." Of similar import is the case of *Lord v. Appleton*, 15 Me. 270. In Chit. on Bills, marg. 453, it is said: "Sending a verbal notice to a merchant's counting-house is sufficient, and if no person be there in the ordinary hours of business it is not necessary to leave or send a written one, nor is it necessary to make inquiries after the party so as to give him notice elsewhere." And, on page 471, the same author says: "If the drawer has a counting-house where he transacts business, and at which the bill was addressed, it suffices to apply there for the purpose of giving notice, without attempting to give or leave notice at the residence of the drawer." To the same effect is Bayley on Bills, 273; Byles on Bills, marg. 280; Story on Bills, § 300; Thomp. on Bills, 509; Dan. on Neg. Inst., § 1016; 1 Pars. on Notes and Bills, 487. The last two elementary authors, after stating the principle as above, express some doubt of the safety of the practice, but they cite no authority in support of their doubts. Edwards, in his work on Bills and Notes, is not definite on this question. See page 456.

On a question of commercial law, such as this, it is highly important that the courts of different States and governments, having commercial intercourse, should be harmonious in their rulings. We find the authorities as we have stated them above, and we do not feel at liberty to depart from them. The Circuit Court did not err in the charges given, nor in the charge refused.

[Omitting minor points.]

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

HONNETT V. HONNETT.

(33 Ark. 156.)

Marriage — duress.

One who had seduced a woman was told by her brother-in-law that if he did not marry her he would never marry another woman, and that the community would lynch him ; but there was no restraint nor threat of present bodily harm from those present. Having married the woman in consequence of these representations, *held*, that he could not avoid the marriage for duress.

ACTION for divorce. The opinion states the case. The complainant had judgment below.

H. Carlton and Read Fletcher, for appellant.

Bell and N. T. White, contra.

EAKIN, J. This bill was filed on the 17th of April, 1876, by complainant against her alleged husband, setting up their marriage on the 6th day of the same month, and that afterward he had treated her continuously with open insult, contempt, unmerited reproach and studied neglect. That he had publicly proclaimed her

a prostitute, and used concerning her other vile epithets, and that her condition had been rendered intolerable. Prayer for divorce, alimony and general relief. There was also a separate petition for an order to restrain the defendant from selling or disposing of his property to defeat alimony, to which petition he responded on the 20th of the same month, denying the marriage, and also his intention to dispose of his property.

Complainant followed her bill on the 9th of May, 1876, with a motion in open court for attorney's fees, and alimony *pendente lite*.

On the 11th of May, defendant filed his answer and cross-bill, setting up in substance that by conspiracy and threats he had been forced to undergo the marriage ceremony, against his own free will, and praying that the marriage might be annulled.

The complainant answered the cross-bill on the 12th, denying all conspiracy, force or fraud, and stating that the defendant, after having seduced her under promise of marriage, had married her at the urgent request of friends, as a reparation of the evil. On the 10th of June, the court below ordered defendant to pay her \$100 as attorney's fees, and the sum of thirty dollars per month for maintenance, *pendente lite*.

A voluminous mass of testimony was taken, upon which the cause was heard. The chancellor found that the defendant had never of his own free will consented to the marriage on the 6th of April; that his apparent consent had been procured by force and threats of violence to his person, such as to put him in fear of his life or great bodily harm; that he never recognized her as his wife, and that the marriage was void. It was so decreed, and the motion for alimony and attorney's fees denied.

Complainant appealed, and an order was made in this court, on the 6th of February, for a further allowance; pending the appeal.

Without detailing the mass of testimony appearing in the transcript, this court finds upon a careful review of the same, the following substantial facts: That the complainant was a young woman of good character and social position. That defendant began paying her the usual attentions incident to courtship whilst she was quite a girl, about fifteen or sixteen years of age; that he persisted in them for a course of years so as to monopolize her society; gained her love and confidence, and under promise of marriage violated her chastity. Early in the year 1876, she became *enceinte* from

this connection. It became known to her relatives during the absence of defendant on a trip to New Orleans.

They considered her ruined and abandoned by defendant, and despaired of his return. She however clung to her confidence, and continually asserted that he intended to return, and do her the only justice which remained in his power.

Meanwhile great excitement prevailed amongst the friends of the families, most of whom seem to be Israelites. Defendant returned on the 6th of April, and went peaceably and unmolested from the steamboat to his place of business. He was there called upon by numbers of his friends, who reproached him with his conduct, and by arguments, expostulations, and by threats of a grave character, urged him to an immediate marriage. He requested time to make up his mind, but was told that the matter would not admit of delay. The only direct threat emanated from the brother-in-law of complainant, who remarked if he did not marry complainant, he would never marry another woman. He explains the threat in his deposition to mean, that he would follow him up and disgrace him wherever he went, even if he went to Germany, and that he had been offered money for the purpose. There is some evidence also that he was told that if he did not marry the woman he would be lynched, not by parties present, but by others in the community.

During this pressure and these expostulations, defendant was much moved. He shed tears and trembled, and seemed sorely perplexed. He was appealed to by the portraits of his parents which hung in the room to act honorably in this matter, marry the complainant, and make all things right. He was assured that they might still live happy and respected. He was very reluctant to consent, but yielding to these influences, whether from fear or from remorse, finally did so; to the great satisfaction of all concerned. He went with a friend to the clerk's office to procure his own license, and several hours afterward came with a friend to the house of complainant's brother-in-law, where she resided and where the ceremony was duly performed. He remained but a short time afterward, and left; since that time he has refused to live with her or even visit her, and to justify himself, announced on divers occasions and to different persons, that she was unchaste, and had been guilty of intercourse with other men. Of this he does not offer one *scintilla* of proof, or ground of suspicion, beyond his own

declaration. The character of the lady as to this matter is established by the most conclusive testimony.

Afterward, being put upon trial, by some association of which he was a member, for his conduct toward the lady, he announced that he had made her his wife, and that it was no longer the business of the members to inquire into his private affairs. It seems that he was acquitted on these grounds.

Taking the whole testimony, it is impossible for this court to determine the true motives that actuated the defendant in consenting to the marriage. He was certainly under no fear of bodily harm from those around him, who were urging him to it. They offered none and allowed him to go to and fro without hindrance. He might possibly have been in general fear of the consequences of his act, from the natural impulses of resentment on the part of her relations, as he well might be; and may have failed in the courage necessary to meet the consequences. He may have feared the frowns of his people, and loss of caste and confidence, or the withdrawal of their aid. He may have been actuated by genuine emotions of remorse induced by the appeal to his parents. Certainly the influences, whatever they were, were irresistible. He consented with the greatest reluctance.

Meanwhile, the complainant took no part in any of the proceedings, nor does she seem to have been aware of them, although she doubtless knew her friends were urging the marriage. She remained passive and trusting until defendant came to the house, and led her from her sick room to be married. His refusal to remain with her caused great distress to herself and her friends, and this, with the reasons assigned, caused the filing of her bill.

It is difficult to speak with calmness and patience of the conduct of the defendant throughout this affair, toward the helpless victim of his selfish passions. In marrying her he did what he ought to have done, and we prefer, in case of doubt, to attribute his action to the better motives of remorse and a sense of justice. His highest motive would have been to save, in some degree, the character of the confiding woman whom he had ruined—to relieve the shame and anguish of her condition, to give her his name, and his child a legitimate father; and to win back the confidence and friendship of his people.

But if his motives were lower, and he feared the natural and probable consequences of a treachery and a crime, and married to

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escape them, it would not be such duress as would avoid the marriage in the absence of any force, or direct threat of bodily harm at the time the act was done. It would be shocking to allow one to escape the probable and natural consequences of such an outrage, by a marriage, and then having obtained security, to immolate his victim by repudiation of his act. She, at least, was no party to any fraud or duress.

The chancellor, we think, erred in his findings from the evidence.

Had there been actual duress, it was a tort, which defendant could waive; and we find him afterward, when under no other duress than fear of expulsion from an association, owning his marriage as a voluntary act, and claiming immunity under it.

The equity of complainant for a divorce on her part must rest upon the ground of such indignities to her person as rendered her condition intolerable.

After the decision of this court in the case of *Rose v. Rose*, 9 Ark. 507, we cannot hesitate to declare, that without any fault of hers, to abandon his wife on the day of marriage, with declarations indicating a fixed and unalterable determination never to live with her or treat her as a wife, and to add to this insult, the deeper injury of traducing her character, without the shadow of proof, was an indignity calculated to crush to earth any woman of ordinary sensibilities.

We think the chancellor erred also in denying her the relief prayed in her bill, both as to divorce and alimony.

Reverse the decree, and remand the cause with instructions to dismiss the cross-bill, and grant a divorce to complainant, with suitable alimony and attorney's fees to be ascertained by reference to a master, or in any other mode the chancellor may deem most fitting in accordance with equity practice.

Decree reversed.

LITTLE ROCK AND FORT SMITH RAILWAY COMPANY V. BARKER.

(33 Ark. 350.)

Damages — measure of — in action for negligent killing.

In an action by a parent, under the statute against a railway company for the negligent killing of a child, there can be no recovery for loss of companionship and association, and injury to the parent's feelings, but the recovery is restricted to the expenses and the loss of probable services during minority.*

ACTION for negligent killing of a child. The opinion states the case. The plaintiff had judgment below.

Clark & Williams, for appellant.

Hughes, contra.

ENGLISH, C. J. This action was commenced in the Circuit Court of Pulaski county, on August 14, 1875, by Emma O. Ammon against the Little Rock & Fort Smith Railway Company.

The complaint alleges, in substance, that on April 26, 1875, while the plaintiff's son, Alpheus D. Ammon, a child five years old, without discretion, and without any knowledge or negligence of the plaintiff, was playing on or near the track of the defendant corporation, in the town of Argenta, etc., the defendant, by its agents, and servants, carelessly and negligently caused one of its locomotives, with a train of cars attached thereto, to approach said child with great and unusual speed, and then and there to pass rapidly over the track of said company, and negligently and carelessly omitted while so approaching said child to give any signal, by ringing the bell or sounding the steam whistle, in time for the child to be rescued from danger, or get from the track, and also negligently and carelessly omitted to stop said locomotive and cars, although it had ample time therefor before reaching said child. That by reason of said negligence of the defendant the said locomotive struck said child, ran over and crushed both his legs, and so severely bruised and lacerated them that it was necessary to amputate both of them and in consequence of said injury said child suffered great and in-

* See *Matthews v. Warner* (29 Gratt. 570), 26 Am. Rep. 306.

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describable bodily pain, and died from said bruising and crushing about ten hours thereafter, on said April 26, 1875, before which time said child's father had died, whereby an action accrued to plaintiff, the mother of the child, against the railway company, and by which she has been damaged in the sum of \$20,000, for which she prays judgment.

By an amendment to the complaint, filed May 24, 1876, the plaintiff alleged that a part of said damages accruing to her as alleged in said complaint was a large amount of money necessarily paid out by her for the attendance of a physician, and all funeral expenses attending the child's burial, amounting to ——— dollars, and a part consisted in the loss of the services, companionship, and association destined to be rendered by said child to plaintiff.

[Omitting immaterial statements.]

The cause was submitted to a jury, and, after the evidence was introduced, the court gave thirteen instructions to the jury, on motion of plaintiffs, "to the giving of which instructions," the bill of exceptions states, "especially the 3d, 6th, 9th, 10th, 11th, 12th, and 13th, the defendant objected, and the court overruled its objection."

The defendant moved seven instructions, all of which the court gave.

The jury returned a verdict in favor of plaintiffs for \$4,500 damages.

The defendant moved for a new trial, on the grounds:

1. The court erred in the rule of estimating damages, and in allowing funeral expenses to be estimated, and admitting evidence of such expenses.

2. The court erred in instructing the jury as moved by plaintiffs.

3. The damages assessed by the jury are excessive.

The court overruled the motion for a new trial, and rendered final judgment for plaintiffs in accordance with the verdict. The defendant took a bill of exceptions, setting out the evidence, instructions, etc., and appealed to this court.

I. By the common law the death of a human being could not be made the subject of a civil action. *Baker v. Bolton*, 1 Camp. 493; *Sedgw. on Dam.* (6th ed.) 551, 694.

By section 1 of the act of February 3, 1875 (Acts of 1874-5, p. 133), "All railroads which are now or may hereafter be built and operated in whole or in part in this State shall be responsible

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for all damages to persons and property done or caused by the running of trains in this State." See § 12, art. 17, Const. of 1874; also, § 32, art. 5.

By section 3 of same act, "When any adult person be killed by railroad trains running in this State, the husband may sue for damages to a wife. In all other cases the legal representative shall sue. If the adult be wounded he may sue in his own name. When the person killed or wounded be a minor, the father, if living; if not, then the mother; if neither be living, then the guardian may sue for and recover such damages as the court or jury trying the case may assess."

In this case the mother sued the appellant railway corporation for damages for the negligent killing of her infant son, and she may unquestionably maintain such action under the above statute, though she could not by the common law.

II. The first and third grounds of the motion for a new trial present the kindred questions—what is the measure of damages in this action, and were the damages assessed by the jury excessive?

[Omitting a statement of the evidence.]

The seven instructions which the court below gave to the jury on the motion of appellant all relate to the subject of negligence on the part of the servants of appellant, and contributory negligence on the part of the plaintiff mother and her child. None of them relate to the subject of damages, and appellant asked no charge on that subject. So all of the instructions given by the court at the instance of appellees, except the tenth, relate to the subject of negligence.

The tenth follows: "If the jury find for the plaintiff, they may assess damages for not only the medical attendance upon and nursing of the deceased before death, and reasonable funeral expenses after death, but such other pecuniary damages as, under all the circumstances proven, they may consider reasonable."

In this country, under statutes similar to ours, as well as in England under Lord CAMPBELL's act (9 and 10 Vict., ch. 93), the ground of recovery must be something beside an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecuniary standard. Exemplary damages are therefore not to be recovered unless the statute expressly or by implication allows them, as in some instances

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(California, for example: *Meyers v. City of San Francisco*, 42 Cal. 217) it does. But in estimating damages some departure from the standards applied in other cases is essential, as otherwise in some cases no recovery could be had at all, though the statute plainly gives the action. If a parent sues for the killing of a minor child who is yet too young to render service, it is manifest that for the time being there could be no pecuniary loss whatever, and whether the child, if living, would ever become serviceable must be matter for speculation only. Yet as the statute plainly gives the right of action for the benefit of the parent, without restriction as to circumstances, but manifestly assumes that there is some injury in every case, the right to recover in these cases must be deemed unquestionable. Cooley on Torts, 272.

The damages are not to be given as a *solatium*, but must be founded on pecuniary loss, actual or expected, and mere injury to feelings cannot be considered. *Id.* 473, and cases cited; Sedgw. on Dam. (6th ed.) 696, and notes.

The statute giving the mother, the father being dead, the right to sue appellant for damages sustained by her by reason of the killing of her infant child, any necessary expenses incurred by her for nursing and medical attendance before its death, and for burial expenses afterward, were proper elements of estimate by the jury in making up the damages to be awarded to her, if they found the appellant corporation guilty of the negligence imputed to it in the complaint. *Pennsylvania R. R. Co. v. Barton*, 54 Penn. St. 496; *Cleveland & Pittsburg R. R. Co. v. Rowan*, 66 id. 399.

The value of the services of the child, lost to the mother by the death of the child, was also a legitimate element to be estimated by the jury in making up their verdict upon the question of damages.

The statute prescribes no rule for estimating such damages, but the construction which has been given to similar statutes by the courts must furnish the guide. Nor does our statute limit the amount of the recovery, as the statutes of some of the States do, but juries are not warranted in finding verdicts for sums disproportionate to, or in excess of, the probable pecuniary loss of the parent, occasioned by the death of a child. Reasonable damages only, in view of all the circumstances in evidence, should be awarded. *Pennsylvania R. R. Co. v. Barton*, *supra*.

We find no substantial error in the ruling of the court below in

relation to the admission of evidence of funeral expenses, nor in giving the tenth instruction, above copied, as far as it goes.

Counsel for appellant submit that the damages allowed by the statute to the mother for the killing of her child are such only as the child would have recovered at the moment of its death, and that nothing can be awarded to her for the loss of after-service ; that the loss of service in this case must be limited to the period that intervened between the time the injury was inflicted upon the child and its death, which was ten hours. If this be true, had the child been killed instantly, the mother could have recovered nothing but such expenses as she necessarily incurred in the burial of the child, and this construction of the statute would render it nugatory.

Counsel also submit that no loss of after-service is alleged in the complaint, and that therefore there could be no recovery for such loss, citing *Gilligan v. New York & Harlem R. R. Co.*, 1 E. D. Smith, 461.

It is true that in the original complaint there is no allegation of loss of service, or special damages by reason of expenses incurred ; but in the amendment to the complaint the plaintiff claims damages for money necessarily expended for medical attendance and in the burial of the child, and also for loss of the services, companionship, and association destined to be rendered by the child to the plaintiff.

For the loss of the companionship and association of the child, and for the grief of the mother on account of its death, the statutes, interpreted in the light of judicial decisions upon like statutes, afford the bereaved mother no compensation. Such loss and such grief would be difficult to measure and cannot be compensated by money ; and the court below, in its charge to the jury, should have so declared the law to be.

We close this branch of the case by announcing our conclusion, that when a mother sues a railway corporation under the statute for the negligent killing of her infant child, the measure of damages is the expense necessarily incurred by her for medical attendance, nursing, and burial of the child, and reasonable compensation for the loss of the probable services of the child during the period of its minority, difficult as it may be to estimate the value of such loss.

[Omitting the question of amount of damages.]

Judgment reversed.

BRODIE V. WATKINS.

(33 Ark. 545.)

Damages — measure of, on breach of contract — between attorney and client.

In case of a special contract for legal services for a percentage of the recovery, where the services are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, he may claim the whole compensation agreed on, subject to such abatement as would, in the natural course of things, have been incurred by him if the services had been continued.

MOTION to settle amount of attorney's fees. The opinion states the case.

EAKIN, J. The property in this case sold for the sum of \$10,000, which sum, in the adjustment of other attorney's fees, has been taken without objection, as the amount recovered.

B. D. Turner, Esq., an attorney-at-law, on the 1st of June, 1877, filed an application in this court for a lien upon the fund for services rendered the appellees; stating that they had agreed to pay him ten per cent upon the amount collected; that under the agreement, he instituted the suit and rendered material services in the prosecution.

Objections are made by Greer & Baucum, assignees of the claim upon which the decree was rendered. They allege that Turner did not prosecute the suit to judgment, whereby they were compelled to employ other attorneys, who have also filed liens for services; that the claim is exorbitant and unjust, and was not filed in the time prescribed by law.

The lien had been filed also in the court below, and no point is made by counsel as to time.

The testimony taken regarding this lien shows: That Turner was employed by Watkins to prosecute the suit under a special agreement to give him ten per cent on the amount collected. Turner drew the bill and commenced the suit in 1872; attended the Pine Bluff court in November; filed an amendment to the bill, which he states was rendered necessary by disclosures in the answer; made arrangements for taking depositions, and was engaged in the prose-

cution of the suit until early in October, 1873. Meanwhile litigation had grown up between Watkins and Turner regarding other matters; and about the last named date, Watkins peremptorily discharged Turner as his attorney; demanded of him the papers, and employed other attorneys. Turner expressed himself ready and willing to continue the case and fulfill his part of the contract, and from all that appears, has continued so since. Watkins says that he suspected Turner was not prosecuting the suit with diligence, but that he would not have discharged him but for the personal litigation which had arisen between them.

The duty of an attorney or solicitor toward his client, and his obligation to regard the confidence reposed in him, should be wholly independent of, and above any personal affection or dislike; and these cannot be supposed to affect his conduct. An attorney, with the highest appreciation of the honor and dignity of his profession, should rather, in case of a personal quarrel, be stimulated thereby to more zealous efforts in his client's behalf, and more punctilious discharge of duty.

Where no want of fidelity is shown, a suspicion of it savors of insult; and a discharge of an attorney on account of feelings engendered by matters outside of his employment, is an injury to, or at least an imputation upon his professional honor, more grievous to a sensitive man than the loss of the particular business. Certainly it is desirable that the client should have for his adviser one with whom he has pleasant personal relations. If Watkins had courteously represented this to Turner upon the breach between them, and proposed a dissolution of their relation on that account, with an offer to settle fairly for services rendered, no difficulty would probably have arisen. He chose to dismiss him; and employ other attorneys. It would not have been delicate, after that, in Turner, to have interfered with the business in the hands of the other attorneys, and he was absolved from any further duties in that regard. He had, nevertheless, a right to stand upon the contract.

Where there has been a special agreement for labor, service, or the delivery of goods, at a stipulated value, and the party bound to the services or the delivery is ready and willing to perform his part, but it is wrongfully prevented by the other, the measure of damages is the profit which would have inured to the party willing to perform, if the contract had been fully executed on both sides. It is not necessarily or commonly the gross sum agreed to be paid.

Brodie v. Watkins.

In many cases the damages are easily estimable. For instance, in the class of cases where successive deliveries of produce, or commodities, are to be made to a certain amount, within a fixed time, at a stipulated price, and the vendee refuses to receive them. There the complainant can only recover the difference between the market price and the agreed price of the articles rejected, for that would have been the limit of his profit. And so when contracts have been made for the whole time of a person in any employment, and the services have been rejected. There the employee is held to make a fair and reasonable use of the time which belonged to the employer, and can only recover the difference between what he received or might have received, and the price agreed. These propositions are sustained by the whole current of authorities in all the States, and commend themselves at once to the highest sense of justice and right. The criterion extends to all kinds of executory contracts, and the conflict of authorities arises upon the difficulty of its application to cases where the services are not easily partible.

Legal services are of this last-named character. They cannot be apportioned either by time, or the amount of physical labor expended in drawing papers, attending courts, and oral arguments. It is the attorney's judgment, his learning, his responsibility and advice, which is relied upon, and which gives the peculiar value to legal services. Perhaps the most difficult and valuable services of the attorney may be rendered in considering his client's case, and giving him confidential information, before any visible act is done. These are general considerations, to show that the professional services of an attorney cannot justly be apportioned by the plain and obvious mode indicated above for cases of other classes.

A review of all the authorities, cited on both sides, leads the mind to the conclusion that in cases of special contracts for legal services, which are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, the latter may claim the whole compensation, subject to such abatement as would, in the natural course of things, have been incurred if the services had been continued. The value of the legal services proper will not be apportioned; but whilst, upon the one hand, the attorney will not be put upon the *quantum meruit*, he ought not to recover more than he would have made if he had gone on with the case. His time, however, does not belong wholly to his client, and no deduction can, in ordinary cases, be justly made on the presumption that it

was wholly occupied in other professional business. Such a case might perhaps be made out, but it would be exceptional, and stand upon its own circumstances.

The attorneys who conducted the cause after Turner's discharge are of high standing and known ability. They assumed the duties, under circumstances consistent with the highest sense of professional etiquette, and brought it to a successful termination. Whilst it may be supposed that Turner would have done as well, it cannot be presumed he would have done better, and we may take the case as a guide in estimating his pecuniary loss in some approximate manner.

After the discharge of Turner, the case was pending in the Jefferson Circuit Court during four terms. It would have been necessary for the attorney to attend that court at an expense of \$25 or \$30 a term. He would have been under the necessity of attending at this place at least twice at something about the same expense. Doubtless other incidental expenses would have been necessary, which he could not have charged to his client. An accurate account of these probable expenditures would be impossible, and the court, in the exercise of a fair discretion, upon the evidence presented, is of the opinion that a deduction of \$200 would be proper.

Allow the lien for \$800, and let it be paid out of the fund in the master's hands.

WILSON V. STATE.

(33 Ark. 557.)

Concealed weapons — evidence.

Under a law prohibiting the carrying of weapons except on one's premises, or in travelling with baggage, or when acting as or in aid of an officer of justice, it is not unlawful to carry an army pistol to kill wild hogs, and the defendant's declarations at the time of borrowing such a pistol of his purpose are admissible in evidence.

CONVICTION of carrying weapon. The opinion states the case.

ENGLISH, C. J. Chancy Wilson was indicted in the Circuit Court of Arkansas county, at March term, 1878, as follows:

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“The grand jury, etc., etc., accuse Chancy Wilson of the crime of carrying side-arms, committed as follows, to wit: The said Chancy Wilson in the county aforesaid, on or about the 14th day of February, 1878, did then and there unlawfully carry a pistol as a weapon, contrary to the statute in such case made and provided, and against the peace and dignity of the State,” etc.

The defendant demurred to the indictment; the court overruled the demurrer; he was tried and convicted; a new trial was refused him, and he took a bill of exceptions and appealed.

I. It is submitted for appellant that the indictment is bad, because it does not negative the exceptions contained in the proviso of the act under which it is preferred. Acts of 1874-5, p. 155.

When there is an exception in the enacting clause of a statute it must be negatived; but when a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the proviso it contains. *Britton v. State*, 10 Ark. 301; *Matthews v. State*, id. 485; *Shaver v. State*, id. 259; *Bone v. State*, 18 id. 113; 1 Whart. Cr. Law (6th ed.), 378.

The enacting clause of the statute makes it a misdemeanor, punishable by fine, for any person to wear or carry as a weapon, any pistol, dirk, butcher or bowie knife, sword or spear in a cane, brass or metal knucks, or razor. In a proviso, exceptions are made in favor of persons on their own premises, or travelling through the country on a journey with baggage; officers of the law engaged in the discharge of official duties, or persons summoned by an officer to assist in the execution of process, or a private person authorized to execute process.

It is sufficient for the indictment to charge the offense prohibited by the enacting clause of the statute, and if the accused is within any of the exceptions mentioned in the proviso, it is matter of defense.

It follows that the court below did not err in overruling the demurrer to the indictment.

II. It was proven on the trial that appellant borrowed of witness Bowers, a large army size six shooter, a revolving pistol, 44 caliber, eight inches in the barrel, such as is commonly used in warfare, stating at the time he borrowed it that he was going over to Pearman's to shoot wild hogs. On the next day he went to Pearman's, stated to him the purpose of his visit, and while conversing with

him, before going into dinner, pulled the pistol out of his boot, cocked it a few times to see if it would revolve, and then put it around under his coat, and went in to dinner.

The court excluded from the jury the statement made by the appellant to Bowers, when he borrowed the pistol from him, as to the use he intended to make of it, and a like statement made by appellant at Pearman's where he took the pistol from his boot in his presence, etc. These declarations were admissible as part of the *res gestæ*. *Pitman v. State*, 22 Ark., 357.

III. The appellant, among other instructions, asked the court to charge the jury, that if they believed from the evidence that the pistol carried by him was an army size pistol, such as are commonly used in warfare, they should acquit; which was refused by the court.

In *Fife v. State*, 31 Ark. 455; s. c., 25 Am. Rep. 556, on review of authorities, we held that the legislature might constitutionally prohibit the carrying of such pistols and other arms easily concealed about the person, as are used in quarrels, brawls and fights between maddened individuals, but that the Constitution guaranteed to the citizens the right to keep and bear arms for defense, etc.

And it was indicated in the opinion that the legislature might, in the exercise of the police power of the State, regulate the mode of wearing war arms, and no doubt the occasions of wearing such arms may be to some extent regulated.

Thus it has been made an offense to wear a pistol, etc., concealed (Gantt's Dig., § 1517) and this may well apply to the character of the pistol used as a war arm.

So hunting with a gun with intent to kill game, and shooting for amusement, on the Sabbath, are made offenses. Gantt's Dig., § 162.

No doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections, etc. *Andrews v. State*, 3 Heisk. 182; s. c., 8 Am. Rep. 8.

But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey travelling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.

If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the peni-

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tentiary and gallows, and not by a general deprivation of a constitutional privilege.

The judgment is reversed and the cause remanded for a new trial.

Judgment reversed.

LITTLE ROCK AND FORT SCOTT RAILWAY COMPANY V. PAYNE.

(33 Ark. 816.)

Constitutional law — legislature prescribing rule of conclusive evidence — double damages for killing stock.

The legislature cannot prescribe a rule of conclusive evidence.

A legislative act providing for double damages against railways for killing or injuring stock, is constitutional.*

ACTION for injury to a horse. The opinion states the case. The plaintiff had judgment below.

Clark & Williams, for appellant.

Ford, contra.

EAKIN, J. Payne sued the railroad company before a justice of the peace, for damages resulting from breaking the leg of a horse and injuring him permanently — claiming \$150. He recovered \$100, and the road appealed to the Circuit Court, where, upon trial, the jury rendered a verdict against defendant for \$200, upon which judgment was entered. There was a motion for a new trial overruled, bill of exceptions and appeal.

[Omitting a question of evidence.]

It is urged upon the court to rule, in this case, upon other points made by the record, involving the construction and validity of the act of February 3, 1875, entitled "An act requiring railroad companies to pay for damages to persons and property, and for other purposes."

The court, upon motion of plaintiff, and against the objections of defendant, gave, amongst others, the following instruction: "If

*To same effect, *Cairo & St. Louis R. Co. v. Peoples*, post.

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the jury believe, from the evidence, that the defendant's engine, or cars, ran over or against the horse, mentioned in the complaint, and that the animal died from wounds or injuries thus received, they should find for the plaintiff and assess his damages at a sum equal to the actual value of the horse on the day he was injured, together with six per cent interest thereon from that until the present day. But if the jury find for the plaintiff, and also find that the engineer, or conductor on the train, doing such injury, knew that the same was done, and failed within one week thereafter to cause to be posted, by the station master, or overseer at the nearest station-house, and at the nearest station-house and depot house, a correct description of said horse, including his color, marks, brands, and such other natural description as might have assisted in identifying said horse; and also a notice of the time and place where said horse was injured, and to keep such notice and description so posted for twenty days thereafter; then they should assess the damages of the plaintiff at double the actual value of said horse."

The following, in effect, amongst others asked on the part of the defendant, were refused:

3. That the jury must not only find that the injury was inflicted by the train, but that it was done through the want of due care and skill or diligence on the part of defendant's agents, or employees, or some of them in charge of the train.

4. That the company was not liable for injury to animals running at large in the range, and straying upon its track, where the company and its agents use due caution and reasonable care and diligence to avoid said injury.

5. That the *onus probandi* was on the plaintiff, notwithstanding the eighth section of the statute.

6. That the company could not be made liable under the Constitution and laws of the State for double damages, as provided by the second section of the statute.

There were other instructions, principally regarding the weight of evidence and the duties of the jury with reference to the conflict therein, which on the whole were well given and need not be noticed.

The statute referred to provides, by section 1, that "all railroads, which are now, or may be hereafter built and operated, in whole or in part in this State, shall be responsible for all damages to persons and property done or caused by the running of trains in this State."

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The second section makes it the duty of the conductor or engineer, when stock of any sort are killed, to make the advertisement, indicated in the instruction for plaintiff, and provides that "on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock so killed and not advertised."

The fifth section provides a mode of arbitration between the company and the injured party.

The eighth section provides that "the killing of stock on any railroad track shall be *prima facie* evidence that it was done by the trains, and the *onus* to prove the reverse will be on the railroad company."

There are other sections not bearing upon the points at issue.

The court below construed the first section of the act as imposing upon the road an absolute liability to pay for stock killed by the trains, and withdrew from the consideration of the jury all considerations of negligence on the one hand or due care on the other. This would be to make the railroad companies insurers of the safety of all the live animals in the State against injury from their roads, and would either take away from them defenses which all other corporations and persons might by law set up, or make the killing of stock conclusive evidence of want of due care, and negligence. In the absence of express language we cannot suppose that the legislature intended either. Railroads are useful to all the community, in the development of the resources and increase of the wealth of the State. The exercise of their franchises, and the pursuit of their business, is lawful, and to hold them liable for unavoidable accidents, which could not have been prevented by due care, is contrary to reason. It is not within the province of the legislature to divest rights by prescribing to the courts what should be conclusive evidence. This matter was fully considered by this court in the case of *Cairo & Fulton R. R. Co. v. Parks*, 32 Ark. 131, which arose under a statute, which endeavored to make a county clerk's deed of lands, sold for taxes, conclusive of its recitals against the true owner. Justice WALKER, in delivering the opinion, remarked: "The legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false; at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property." Railroad companies have the right to run their trains, and the consequent right of being protected in

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doing so, unless damage to others should result from some negligence, want of due care, or culpable neglect of reasonable precautions, imposed by the legislative power. It affects their substantial rights of property to be able to show the facts, and they cannot be constitutionally deprived of the power.

There are cases where this indisputable liability has been imposed upon railroads and sustained by the courts. It has generally been in those States whose circumstances and policy have required railroads to be fenced by the company, and where there have been express laws imposing this duty. These cases obviously rest upon the neglect of the company in fencing so as to keep animals off the track.

In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but in compensation are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt.

In Georgia, by act of December 30, 1847, the legislature declared, in language substantially like ours, "that the several railroad companies of this State shall be held liable in law for any damage done to live stock or other property (to the owner or owners thereof) by the running of the cars or locomotives of such companies or their roads respectively." This is very broad and very positive, yet the courts of that State have never given it any other effect than to impose a *prima facie* liability and to shift the burden of proving due care on the company. *Macon & Augusta R. R. Co. v. Vaughn*, 48 Ga. 464. The court in that case said: "A railroad company is not liable for an unavoidable accident, even under our statute, in relation to stock. If with every reasonable precaution, proper lookout and proper speed and proper attention, an unavoidable damage ensues, the company which has, by law, a right under such precautions to run its trains, is not responsible." * * * "The presumption is against the road, and the proof, under our law, must be made that there was no negligence, nor want of ordinary care."

To the same effect, upon a similar statute, have been the rulings in Alabama. *Mobile & Ohio Railroad Company v. Williams*, 53 Ala. 595; s. c., 13 *Am. Railroad Rep.* 153.

This is a rational construction of legislative intention, and applicable as regards injuries to stock to our own statute,

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which in many respects seems modeled upon that of Georgia. The court erred in excluding from the jury all considerations of negligence. There were no formal pleadings in the case, but the jury should have been advised to consider all the circumstances developed by the evidence, as to whether the killing resulted from unavoidable accident or might have been prevented by the exercise of reasonable care on the part of defendant's agents. They should have been instructed, also, that the burden of proof was on the defendant, to show that there had been no negligence, nor want of due care; but if it did show that, to find for defendant.

It is apparent that the verdict of \$200 in this case is based upon an estimate of \$100 as the value of the horse, and the instruction for double damages, for want of the subsequent notices prescribed by section two of the act.

The power of juries at law to render vindictive or punitive damages for certain classes of torts is based upon the idea of blending the interests of society with the rights of suitors, and rendering the administration of civil justice ancillary to the deterring influences of more direct punishments on behalf of the State. The same idea has prompted the legislature, at times, to prescribe double or treble damages to be rendered in behalf of individuals, in aid of some policy of the legislature directed to the protection of property, or the peace of society, or the ready collection of the revenue of the State. We have many such laws upon our statute books, and the courts have never considered them amenable to the charge of taking property of A for B in any unconstitutional manner. For instance: By § 3190 of Gantt's Digest, owners of animals breaking through, or over sufficient fences, are made liable to double damages for a second trespass; and by §. 3192, the person damaged by animals breaking an insufficient fence is made liable in double damages for killing or otherwise hurting them.

The only distinction between such cases and this is, that in those cited the circumstances which aggravate the injury exist and characterize it at the time it is done; whilst in this case the aggravation of damages is made to depend upon a certain neglect of certain directions of the statute, framed for the purpose of giving notice to the neighborhood of the injury done. It is

common in this State to turn stock upon the range, where they are not under the constant supervision of the owners. Injuries to them cannot well be known at the time by the owners, whilst the agents of the road running the trains are generally aware of it. The statute makes it the duty of the engineer or conductor of the train to give the prescribed notice, that the owner may have an opportunity of identifying his property and taking steps for his indemnification, or proposing, or receiving proposals for arbitration, whilst the matter is fresh. In furtherance of this policy it is by another section made a misdemeanor in any employee of the road to mutilate, disfigure, or carry off the carcass of any animal killed, without notifying two citizens to note and preserve the marks and value.

The regulation is a reasonable one, and the legislature seems to have considered its neglect such a mark of carelessness and disregard of the property of others, as to connect it with the act of killing, and make the company liable in double damages for the act of its agent, attended with such subsequent neglect. The distinction between the cases is too nice to form the ground of a constitutional objection.

The Supreme Court of Nebraska, at the October term, 1877, in the case of *Atchison & Nebraska Railroad v. Baty*, 6 Neb. 37; s. c., 29 Am. Rep. 356, held an act unconstitutional which gave double damages to the owner of live stock killed by a railroad, in case the value was not paid in thirty days after demand made therefor. It was supposed to be in conflict with that clause of their Constitution declaring that all fines and penalties should be appropriated exclusively to the support of common schools, and also with the declaration that no person should be deprived of life, liberty or property, without due process of law. A careful consideration of the reasoning and authorities cited in that case has failed to satisfy us of the correctness of the conclusion. It is a grave matter to declare an act of the legislature null and void, and we decline to do so upon a question of doubt.

The true construction of the act in question is, that the killing being shown or confessed, the presumption is that it was done by the train, and that it resulted from want of due care. At common law the *onus* of proving these facts was on the plaintiff. The statute shifts the burden to the defendant,

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but does not preclude the company from showing that such due care was exercised in pursuit of its lawful business as to absolve it from liability. In case the company may be liable at all, that liability is doubled by neglect of its agents to give the notice prescribed by the statute, but the failure to give notice does not impose or create a liability for an innocent act. Whether or not the fact that plaintiff had actual knowledge at the time of the injury to his horse, being present and witnessing the accident, renders the notice unnecessary, and prevents the liability for double damages from attaching, is a question not made by the instructions given or refused, and will not be noticed here.

For error in admitting the testimony of plaintiff's wife, and also of removing from the jury the question of negligence or due care on the part of defendant, the judgment will be reversed and the cause remanded for a new trial.

Judgment reversed.

CASES,
IN THE
SUPREME COURT
OF
COLORADO.

CITY OF DENVER V. CAPELLL.

(4 Col. 25.)

Municipal corporation — duty in respect to sewers.

In the construction of sewers, a municipal corporation is not liable for the adoption of an erroneous plan, nor for a failure to construct them of sufficient capacity to carry off extraordinary rainfalls, although such might reasonably have been anticipated from experience.*

ACTION for damages for flooding of property. The opinion states the case. The plaintiff had judgment below.

Charles S. Thomas, for plaintiff in error.

Patterson & Campbell, for defendant in error.

THATCHER, C. J. The defendant in error was the owner of a two-story brick building, situate on the corner of First and Fifteenth streets, in Kasserman's addition to the city of Denver.

This action was commenced to recover damages, which, it was alleged, were sustained by her, by reason of the overflow of her

* See *Flori v. City of St. Louis* (69 Mo. 341), 33 Am. Rep. 504.

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premises in June, 1874, May, 1875, and August, 1875, and the consequent destruction of certain personal property, contained in the cellar of the building, and injury done to the building itself. It is alleged in the declaration, that these injuries resulted from the carelessness and negligence of the city, in the construction of a drain or sewer at the intersection of First and Fifteenth streets, and in the failure of the city to keep the same open and free from all impediments.

The law confers a power, judicial in its nature, upon the city to construct all necessary drains and sewers ; but until that power is exercised it imposes no legal duty upon the city authorities. Session Laws of 1866, p. 100.

The distinction between the power of the city, and its legal, as separate from its political duty, must be kept steadily in mind. As long as the city authorities fail or refuse to exercise their discretionary powers, no liability attaches ; but if that power be exercised, as is sought to be proved in this case, by the adoption of a partial system of drainage, to the strict performance of whatever ministerial duties may be incident thereto, the city is bound ; and for any failure in that respect it cannot escape liability. But for a mere error of judgment in the plan or system adopted, it cannot be made to respond. If the municipality fails to act, or if acting, it adopts a plan, however inefficient, and constructs its drains in conformity thereto, and injury results to an individual in consequence of the plan being defective, or of the drains not being of sufficient size to accommodate all the water which (if the drains were larger) would naturally flow through them, there is no resulting liability to the city. If, however, a drain be constructed, whether of large or small dimensions, the duty of the city at once arises to keep it in repair. To the extent of its capacity it must be kept efficient. It is equally true that the city is liable for damages resulting from the unskillful or negligent manner of constructing its drains or sewers. These principles are, it is believed, in accord with the weight of authority and the better reason. *Mills v. City of Brooklyn*, 32 N. Y. 489 ; *Carr v. Northern Liberties*, 35 Penn. St. 324 ; *City of Atchinson v. Challis*, 9 Kans. 603 ; *Judge v. City of Meriden*, 38 Conn. 90 ; *City of McGregor v. Boyle*, 34 Iowa, 268 ; Whart. on Neg., § 260 ; Dill. on Mun. Corp., § 802 *et seq.* ; Shearm. & Redf. on Neg., § 127.

In the Pennsylvania case cited, *supra*, Chief Justice LOWRIE,

speaking for the court, says: "Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow, or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted."

The defendant objected and excepted to the introduction of evidence in regard to the dimensions of the drains, the fall given them, and the manner in which they were connected at the point of intersection. It follows from the principles above laid down, that a subsidiary question for the jury to determine in arriving at a verdict, was whether the drains were of sufficient size to carry off the large quantity of water that accumulated near the corner of First and Fifteenth streets on the occasions of the three heavy rainfalls; if not of sufficient capacity, although they may not have been in proper repair, the plaintiff would not be entitled to recover, in a case where the fall of water was so great that the conduits, if unobstructed, would have been so wholly inadequate to carry off its great volume, that the surplus thereof would have overflowed the plaintiff's premises, and occasioned the identical grievance complained of. In other words, if the proximate, efficient cause of the injury is not attributable to the carelessness or negligence of the defendant, there can be no recovery. One method of determining whether the drains, if unobstructed, were of sufficient capacity to carry off the flood of waters, was by a calculation based upon the dimensions of the conduits, the fall given them, and the manner of their construction at the point of junction. For this purpose the evidence was admissible.

It was not proper for them to consider evidence of this character, with the view to fix the liability of the defendant on the ground that the city had adopted an injudicious plan of sewerage, or had constructed sewers that were insufficient, when in good repair, to discharge, at all times and under all circumstances, whatever quantities of water might find their way to them. The jury were not uninstructed upon this point. The court charged them in this behalf as follows: ●

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“ But in ascertaining whether the culverts were unskillfully constructed, you will neither consider the fact of the elbow in the culverts, the inadequate size of them, their inadequate fall or decline, the place where upon the streets they were constructed, nor the plan of their construction, because these are matters wholly of judgment on the part of the agents of the city, and for which defendant is not liable to the plaintiff.”

This instruction was quite as favorable on the points it touches as the law will warrant.

Error is assigned upon the following instruction:

“ If the jury believe, from the evidence, that rainfalls such as those in June, 1874, and May and August, 1875, had occurred in the city of Denver previous to these dates, several times, and within the general knowledge of persons then living in the city, and while such rainfalls had not been frequent, they had still been of occasional occurrence, the defendant cannot escape responsibility in this case, solely on the ground that the rainfalls in controversy were extraordinary or unusual. Such rainfalls cannot be said to be the acts of God, for damages resulting from which persons are in no case to be held responsible. *If such rainfalls might have reasonably been anticipated from past experience, no matter how great or violent they were, the defense must fail the defendant.*”

This instruction is, we think, so worded as to create the impression upon the minds of the jury that it was the duty of the defendant, possessed of the knowledge that extraordinary rainfalls at more or less remote intervals had visited the city, to adopt such a system of drainage as would effectually protect property-owners from injury resulting from the overflow of their premises occasioned by such unusual rainfalls. The city is charged with no such duty. It is not called upon to anticipate or estimate the probable amount of water that may at any time fall within its limits, and to construct drains with reference thereto. It is not legally bound to construct any drains whatever for the purpose of protecting its inhabitants from surface water. If the city constructs a drain it is not for the citizens to say that it is not of sufficient capacity to convey all the water that may accumulate at a time of a flood, such as experience teaches may now and then be anticipated. It is with the city authorities exclusively to determine whether any drain shall be built, its dimensions and the plan according to which it shall be constructed. If the drain intended for the escape of

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surface water be constructed the citizen has a right to expect that it will be kept open and in repair, so that it will at all times, up to its original capacity, be efficient.

The question whether, when a ditch is once constructed, it may thereafter be wholly abandoned, and the city, in consequence of such abandonment, be exempt from liability to an individual in a case where he was left in no worse condition than he would have been had the drain not been made (*City of Atchison v. Challis*, 9 Kans. 603), does not arise, there being no evidence tending to prove such an abandonment.

The jury may have been misled by this instruction which left so much to inference. That in another part of the charge another instruction, laying down the law correctly, and inconsistent with the instruction under consideration, was given, is not material. This court cannot determine by which instruction the jury was governed. It is enough for us to know that error may have intervened. On this ground the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LOCKE V. CITY OF CENTRAL.

(4 Col. 65.)

Municipal corporation — liability for services of officers.

A municipal corporation is not liable to make compensation for services of its officers except as provided by its charter and ordinances.

ACTION for services. The opinion states the case. The defendant had judgment below.

L. C. Rockwell, for plaintiff in error.

H. M. Orahood, for defendant in error.

THATCHER, C. J. In April, 1874, Bradford H. Locke was duly elected by the council of the city of Central as city surveyor for

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the then ensuing municipal year. His general duties were prescribed by ordinance; which also provided that he should "perform such other duties as might be enjoined upon him by ordinance or resolution of the city council." The same ordinance prescribed the compensation he should receive for surveying, subdividing or giving the grade of any lot or piece of ground within the city, and furnishing a certificate thereof—which compensation was to be paid by the parties at whose request such work was done. The ordinance is silent as to fees to be paid the city surveyor for all other services. It was admitted at the trial that he had received full compensation for such work as the ordinance prescribed fees. The suit was instituted to recover for the performance of various duties, imposed upon him by ordinance or resolution, for which no fees were fixed. The plaintiff proceeded upon the notion that upon an implied assumpsit he was entitled to recover from the municipal corporation whatever his services were reasonably worth for the discharge of all duties for which the ordinance allowed no compensation.

It is competent for the city council to increase or diminish the fees pertaining to the office of city surveyor, or abolish them altogether. Its incumbent, if the fees be diminished or entirely taken away, may at once resign. As the relation between himself and the city does not rest upon contract, he is not legally bound to continue his services until the expiration of his term. But having accepted the office, as long as he performs its duties, the measure of his compensation must be determined by the city authorities.

Where the relation of employer and employee exists, both parties are bound by the terms of the contract. If either party violates his agreement with the other, he may sue for breach of contract. If the employer discharges the employee before the expiration of his term of service, he can be made to respond in damages. But between a municipal corporation and its officers, a very different relation exists. If an officer neglects to perform his duties, the municipality has no remedy against him for breach of contract. At his pleasure he may relinquish his office. His remuneration for services to be rendered may, in the absence of any charter restriction, be changed from time to time at the will of the city council. In the *City of Hoboken v. Gear*, 3 Dutch. 278, the court says: "An appointment to a public office, therefore, either by the government or by a municipal corporation, under a law fixing the compensation and the term of its continuance, is neither a contract between the

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public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is, at most, a contract that while the party continues to perform the duties of the office he shall receive the compensation which may from time to time be provided by law." See, also, *Baker v. City of Utica*, 19 N. Y. 326; *Smith v. Mayor of New York*, 37 id. 520; *Commonwealth v. Bacon*, 6 S. & R. 322.

As the city surveyor entered upon the performance of the duties incident to his office with reference to the provisions of the city charter and ordinances, no assumpsit is implied on the part of the corporation in respect to his services. 1 Dill. on Mun. Corp., § 169, and cases cited.

That during the year the plaintiff in error served the city of Central the duties of the city surveyor were more onerous than usual, by reason of the great fire that had destroyed a large portion of the city, cannot be held to affect or modify the rule here laid down. A departure from it cannot but be fraught with mischief to the public service. Whether the dictate of common honesty, under the peculiar state of facts presented by the record in this cause, should have prompted the city council to make the city surveyor additional allowance for his services, it is not our province to determine.

It will follow from what we have before said, in relation to implied assumpsit, that the offer to prove that the city council had paid its former "surveyors on bills presented from time to time irrespective of said ordinance" was properly rejected.

The judgment of the court below is affirmed with costs.

Judgment affirmed.

HAGER V. RICE.

(4 Col. 80.)

Negotiable instruments—evidence of character of acceptance.

In an action by payee against acceptor of a draft accepted by "A, Treasurer," evidence is admissible to show that the acceptance was in an official capacity and was known to be so by the plaintiff.*

*To same effect, *Laftin and Rand Powder Co., v. Stinsheimer* (48 Md. 411), 30 Am. Rep. 472.

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ACTION on drafts. The opinion states the case. The plaintiff had judgment below.

Charles & Dillon, for plaintiff in error.

John W. Horner and D. J. Haynes, for defendant in error

THATCHER, C. J. This was an action in assumpsit, brought by Stephen A. Rice against Frederick D. Hager, upon two certain bills of exchange, in the following form :

“\$309. DENVER, COL., 22d June, 1874.

Ninety days after date, pay to the order of S. A. Rice, three hundred and nine dollars, value received, and charge the same to account of

Boulevard and Sloan Lake Steam Navigation Company.

By WM. ANDERSON, *Pres't.*

To F. D. HAGER, *Treas.*

Denver, Colorado.”

“\$309. DENVER, COL., 22d June, 1874.

Sixty days after date, pay to the order of S. A. Rice, three hundred and nine dollars, value received, and charge the same to account of

Boulevard and Sloan Lake Steam Navigation Company.

By WM. ANDERSON, *Pres't.*

To F. D. HAGER, *Treas.*

Denver, Colorado.”

Written across the face of each bill are the words, “Accepted, F. D. Hager, *Treas.*”

Upon these bills of exchange, the plaintiff sought to charge the defendant individually ; and in the court below, recovered judgment for the amount due thereon. In his third plea, the defendant substantially alleges, that he was the treasurer of the company ; that he was authorized, and it was his duty as such treasurer, to pay out all moneys in his hands, belonging to said company, on its order, and to accept as its treasurer, by the name and style of F. D. Hager, treasurer, all orders or bills of exchange, drawn by said company on its treasurer, and to pay the same when due, if he had sufficient funds of the company in his hands, of all which the plaintiff had notice ; that said bills of exchange were given for an

indebtedness, due from the company to the plaintiff ; that he, to the knowledge of the plaintiff, accepted the same as treasurer of the company, and not otherwise ; that when the bills became due, there was no money of the company in his hands. To this plea the court sustained a general demurrer. The allowing of the demurrer is the chief error relied upon for the reversal of the judgment.

If a bill of exchange is complete in itself, free from any latent ambiguity, obviously carrying its passport upon its face, there is no need of oral testimony to aid in its exposition. The clear and intelligible terms of such an instrument may not be explained by extrinsic evidence. This is a familiar rule, of constant application in the interpretation of written contracts. Can it be said that the drafts in question belong to this class? That upon their face, it is proclaimed to the world that Hager was acting in his individual capacity, in accepting them? Or rather, would not the more natural construction be, that these drafts were drawn by the principal, the company (whose name appears on the face of the instrument), by its president, upon its treasurer as such? Giving to each word its approximate meaning, considering each instrument in every part and as a whole, and having reference to well-established commercial usage, as to the mode of drawing bills of exchange by a corporation upon itself, we do not hesitate in our conclusion, that the drafts in controversy must have been understood, especially if the averments in the third plea are true, as having been accepted by the treasurer as such, and not as an individual. But keeping in view the assignment of errors, it is unnecessary to decide, whether upon the face of the drafts, the acceptance by Hager is *prima facie* only an acceptance by him in his official capacity.

The defendant assumed by his third plea the burden of proving, and at the trial offered to introduce evidence to establish the character of the acceptance, and that the plaintiff, at the time the acceptance was indorsed, had knowledge of the facts set up in the plea, and regarded the drafts as solely the obligations of the company. The case of *Babcock v. Beman*, 11 N. Y. 200, is in point. In that case, Babcock and others brought an action against Beman, as indorser of a promissory note, executed by Adam Smith & Co. and made payable to the order of Beman. The note was in the following form :

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“ Four months after date we promise to pay to the order of R. Beman, treasurer, five hundred dollars, value received.

ADAM SMITH & Co.”

Indorsed, “ R. BEMAN, Treasurer.”

The defendant pleaded that he was the treasurer of the Union Manufacturing Company at Raritan, a corporation created under the laws of New Jersey, and as such had authority to receive the note, and indorse it to the plaintiffs, of which they had notice; that the company was indebted to the plaintiffs for goods sold; that the defendant, having received the note as treasurer of the company, indorsed it as treasurer, and not individually; and that the plaintiffs received it, as an obligation of the company, on account of said debt, and not otherwise. Upon demurrer, the court held the defense good. Upon appeal, the judgment of the lower court was affirmed; the appellate court holding, substantially, that the plaintiffs, having received the note on account of a debt due them from the corporation, with notice of the capacity in which Beman acted, no individual liability attached to him as indorser of the note.

The case before us, upon the face of the bills sued on, is certainly stronger than the one cited. Here the bills were drawn by William Anderson, president of the company. When paid, their amount was to be “ charged to the account of the company.” They were drawn upon and accepted by F. D. Hager, as treasurer. The concurrence of all these circumstances would appear to evince that the bills were solely the bills of the company, and to be paid out of company funds; and would seem to exclude the idea of the personal liability of Hager. The acceptance by Hager, as treasurer, may be deemed as a promise, that on the day named, the company would, through its treasurer, pay the amount of the bills. This is especially true, if the fact that Hager was acting in behalf of the company as its treasurer, in accepting the bills of exchange, was known to Rice, or if, under all the circumstances, he was bound to take notice that he was acting in an official capacity only. Where there is a latent ambiguity, as between the original parties to a bill of exchange and others affected with notice, especially where the name of the principal is in some manner disclosed upon the face of the instrument, we deem the true rule to be, that the real nature of the transaction may be investigated; and the general

principle applies, that an agent is not liable to be sued, upon contracts made by him on behalf of his principal. *Edwards on Bills and Prom. Notes*, 82; *Hicks v. Hinde*, 9 Barb. 528; *Rich. Fred. & Pot. R. R. Co. v. Smead*, 19 Gratt. 354; *Haile v. Pierce*, 32 Md. 327; S. C., 3 Am. Rep. 139; *McClellan v. Reynolds*, 49 Mo. 312; *Musser v. Johnson*, 42 id. 74; *Hovey v. Magill*, Conn. 680.

If the allegations of the third plea are true, it follows from the principles here laid down, that the plea presented a complete defense to the action. The court erred in sustaining the demurrer.

As the other errors assigned were not urged at the hearing, it is not thought necessary to notice them. The views here expressed are not in accord with the majority opinion of the court, in *Tannatt v. Rocky Mountain National Bank*, 1 Col. 278; S. C., 9 Am. Rep. 156. We cannot assent to the doctrine there laid down—a doctrine whose tendency is to defeat rather than effectuate the intention of the parties to written contracts.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

COLLINS V. DAWLEY.

(4 Col. 133.)

Marriage—pledge by wife of policy on husband's life for his debt—renewal of note.

Unless forbidden by statute, a wife may pledge a policy of insurance issued on her husband's life for her benefit, as security for his debt evidenced by his note, and a renewal of the note will not discharge the creditor's claim on the policy.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Sayre, Butler & Wright, for plaintiffs in error.

Belden & Powers, for defendant in error.

Collins v. Dawley.

STONE, J. The principal error assigned is that the court below erred in finding the issues for the defendant in error contrary to the law of the case under the given state of facts.

I. N. Dawley, the husband of the defendant in error, borrowed \$600 from the First National Bank of Denver, and gave his promissory note for the amount payable to J. H. Morrison who indorsed the same to the bank.

In order to indemnify the said Morrison, as well as to secure the bank in the payment of the note, he deposited with the said bank a policy of insurance on his life for the sum of \$2,000, for the benefit of his wife, and also an agreement, signed by his wife, the defendant in error, in the nature of an assignment of the said policy, which agreement was in the following words:

“Agreement: It is hereby understod and agreed, by and between Olive P. Dawley and J. H. Morrison, that in the event that the amount of the life policy, No. 37,389, of the Mutual Life Insurance Company of New York, on the life of Isaac N. Dawley, for \$2,000, should be realized before the payment of a certain note for \$600 made by Isaac N. Dawley and payable to the said J. H. Morrison, due March 30, 1873, then and in that case, so much of the amount sufficient to cancel the said note shall be retained and paid to the said Morrison, or to the payee or payees of said note whosoever they may be.

(Signed)

OLIVE P. DAWLEY.”

Attest: I. N. DAWLEY.

“DENVER, *January*, 18, 1873.”

About fifteen months after the maturity of the note, the said Dawley made a payment to the bank of \$100 and gave a renewal note for the balance due, which was \$500, his brother J. M. Dawley signing the note as surety, the policy of insurance still remaining at the bank as collateral security for the amount due according to the understanding of the parties. The rate of interest on this note was the same as on the first note. No payment had been made on this note when the said I. N. Dawley died. After his death the defendant in error obtained a loan of \$1,000, from the plaintiffs in error upon assigning to them the policy with authority to collect the amount due thereon.

She represented that the policy was lost, and gave, as she was required to do, an indemnity bond to the insurance company, who

thereupon agreed to pay the policy within a year and a day. Plaintiffs in error soon afterward found that the policy was in the hands of the First National Bank, the cashier of which offered to deliver it on condition that the plaintiffs in error would pay the amount of the note yet due. This was agreed to, and the policy forwarded and paid in full, from the proceeds of which the plaintiffs in error deducted the amount which they had paid the First National Bank in discharge of the note, and also deducted the amount of their loan to Mrs. Dawley, and remitted her the balance. She brought suit in assumpsit against the plaintiffs in error to recover the amount so paid to the First National Bank. The declaration contained the common counts only for \$2,000, and the defendants below pleaded *non assumpsit*, and set-off the full amount declared for. The trial was to the court below, which rendered judgment against the plaintiffs in error for the amount paid to the First National Bank, and to reverse that judgment the said plaintiffs prosecute their writ to this court.

Two questions arise for consideration upon the facts in this case:

First. Could the wife assign, or pledge as collateral, the insurance policy, to secure the debt of her husband? and

Second. Did the renewal of the first note operate to release such security?

That a policy of insurance upon the life of the husband for the benefit of the wife, may be assigned or pledged as collateral security by her for the death of her husband, unless prohibited by local statute, is, we think, settled by the great weight of authority. The policy was a writing obligatory for the payment of money, and may be assigned at law as well as in equity. *DeRouge v. Elliott*, 23 N. J. Eq. 486; *Charter Oak Ins. Co. v. Brant*, 47 Mo. 419; S. C., 4 Am. Rep. 328; *Chapin v. Fellows*, 36 Conn. 132; S. C., 5 Am. Rep. 49; *Merrill v. N. E. Mut. L. Ins. Co.*, 103 Mass. 245; S. C., 4 Am. Rep. 548; 1 Schouler Pers. Prop. 709-710; 2 id. 672-3; Bliss on Ins., §§ 341-349. And the assignment may be for a moiety of the sum due upon the policy. *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398.

A point is raised by counsel for defendant in error, that by the laws of the State of New York, where the policy was executed, it was not assignable, but since the laws of New York touching this point are not set out in the record before us, we are unable to pass upon

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this point, and must allow the usual presumption to govern in such case. *Kline v. Baker*, 99 Mass. 254.

The laws of Colorado, placing a married woman upon the same footing as a *femme sole* with respect to her own property, must to that extent govern in this case.

As to the second point, we think the security afforded the First National Bank by the policy as collateral was unimpaired by the renewal of the first note. It is claimed by counsel for defendant in error, that she stood in the position of a surety, and that the payment of the \$100 mentioned, and the giving of the new note for the balance due, was a payment of the first note, and therefore operated to discharge her liability as such surety. Had the policy not been deposited with the bank, the assignment being made technically to Morrison, and for whose personal indemnity it was not necessary to actually deliver the policy (1 Schouler's Pers. Prop. 710), a very different question would be presented. But in addition to the assignment for the indemnity of Morrison, the policy was delivered to the bank and by it retained. The bank was the real creditor, Morrison being merely an accommodation indorser, and his indorsement, which is shown by the testimony of Moffat, who says: "The note was signed by I. N. Dawley and J. H. Morrison," made the bank the payee of the note. We must therefore take this delivery of the policy to have been, by intentment, a deposit in the nature of a pledge as collateral security for the payment of the debt. This intention is further evidenced by the fact that no demand was made for the re-delivery of the policy to the assignor until after the death of I. N. Dawley, the assured. Such was plainly the intention of the parties to the transaction. *Norwood v. Guerdon*, 60 Ill. 253.

The renewal of a note for which collateral is pledged is not an extinguishment of the debt, and is not payment in that sense so as to discharge the claim of the creditor on the collateral security, unless there is an agreement to this effect. *Pinney v. Kingston*, 46 Vt. 83. A note in renewal is a continuation of the debt merely. *Moses v. Trice*, 21 Gratt. 556; S. C., 8 Am. Rep. 608; 1 Schouler Pers. Prop. 514.

The transaction is to be governed by the real intent of the parties. True, the defendant in error deposes that she never deposited the policy with the bank, nor authorized any one to do so for her, but she also deposes that she never assigned the policy, nor signed

any instrument or agreement of any kind whatever, relating to the policy, and in this statement she is contradicted by Moffat, the cashier of the First National Bank, and by Collins, her own witness, who also swears to the genuineness of her signature to the agreement. She evidently knew that the policy was at the First National Bank, and must also have known how it came to be there, for although when she assigned it to Collins, Snider & Co., for collection to secure her loan, she represented it as lost or mislaid, yet in her deposition she contradicts this by stating that after her husband's death she repeatedly sent to the bank to get the policy.

Upon the whole evidence we must hold that it was competent for the plaintiffs in error, as defendants below, to plead set-off, as they did, of the amount they had paid to the First National Bank, and show such payment in discharge of the last note, as so much money paid to the use of the defendant in error, the plaintiff below. She was paid out of the proceeds of the policy, all that was due her as assignor. The plaintiffs in error, as her agents to collect the policy, though not specially authorized to pay this note, were nevertheless under their general authority invested with all medium powers necessary to be used for the accomplishment of the object of the principal power. 1 Chitty's Contr. (11th ed.) 140.

In paying the note they were discharging a valid lien upon the policy, and were therefore warranted in acting to avoid litigation to the detriment of their principal, and in such act they should be protected by the courts.

The judgment of the court below was not warranted by the law applicable to the facts in the case, and must be reversed.

Judgment reversed.

BOYLE V. PEOPLE.

(4 Col. 176.)

Criminal law—juror—member of association to suppress crime.

On the trial of an indictment for stealing cattle, a person called as a juror is not incompetent merely by reason of his membership in an association, one of whose purposes is to prosecute cattle thieves.

CONVICTION of larceny of cattle. The opinion states the case.

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Haynes & Barnum, for plaintiffs in error.

A. J. Sampson, attorney-general, for defendant in error.

STONE, J. [Omitting minor points]. The challenges to the four jurors, for the overruling of which error is assigned, were for the reason that said jurors were "members of the Cattle Association." The examination of several jurors upon the *voir dire* disclosed the fact that many of the citizens of the county engaged in the business of raising cattle belonged to an association having for its general objects the promotion of the interests of stock growing, and in furtherance of such interests, under the constitution or written compact of the association, it became the duty of any member "knowing of a person stealing cattle from a member of the association, or from any one else, to report it," after which it became the duty of the executive committee to prosecute such cases. It also appeared that the executive committee had employed an attorney to assist the district attorney in the prosecution of this case, and had paid the expenses necessary in procuring the attendance of two witnesses from the adjoining State of Kansas. It was further testified that the organization was not a secret one, and that the prosecution of cattle thieves was only done through the legally constituted mode of trial in the courts, and with no attempt to procure the conviction of any except guilty parties.

One juror who stated that he was an officer of the association was set aside by the court. Of the four jurors challenged, which challenge was overruled, three were members of the association. These all stated in answer to a question by the court that they had each done nothing, nor had been called upon to do any thing, by virtue of being members of the association, toward the prosecution of the defendants.

Nothing was elicited to show that these jurors had agreed to contribute any thing toward the expense of the prosecution, nor that they were liable or bound in any way to such contribution, or were affected by any pecuniary interest whatever in the case, present or future. In all other respects they had shown themselves by their answers to be impartial jurors, and indifferent as they stood sworn.

The question then to be determined under this assignment of error is, were these jurors disqualified (they having been challenged

for principal cause) from the mere fact of their belonging to such association?

The cases we find most nearly in point are the case of *State v. Wilson*, 8 Iowa, 407, and the Massachusetts case cited by the attorney-general.

In the Iowa case the juror was asked if he was "a member of an association or organized company for the prosecution of persons generally, arrested for horse stealing." This question was objected to, and the objection being sustained, the Supreme Court held it no error, on the ground that such fact, if shown, would not have disqualified the juror. The lower court ruled that the question might be asked in the following form: "Whether he was a member of any organization existing in the county or elsewhere, engaged in prosecuting the present cause." It does not appear from the report of the case whether this latter question was answered or not, but the Supreme Court held that no prejudice resulted to the defendant from the change made in the form of the question by the court below. This case is cited in Hilliard on New Trials, § 66, and in Proffat on Jury Trials, § 169, in support of the doctrine that members of an association, combined to check a certain crime, are not therefore incompetent as jurors in a trial for such crime, "because that is an interest that ought to be common to every citizen."

In the case of *Commonwealth v. Livermore*, 4 Gray, 18, the court says: "The defendant excepted to the competency of a juror because he was a member of an association called the Carson League. But as the court has no knowledge of the assumed obligations of the members of that association, besides what the juror stated to be his understanding of them, we are not prepared to decide that in this instance a new trial should be granted because the juror was not set aside. We deem it to be our duty, however, to say that in our judgment the members of any association of men, combined for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, cannot be held to be indifferent, and therefore ought not to be permitted to sit as jurors in the trial of a cause in which the question is, whether the defendant shall be found guilty of violating that law."

The same question after arose in the case of *Commonwealth v. O'Neil*, 6 Gray, 343, in which the court, in overruling the exceptions, say: "We are of opinion that sufficient does not appear on

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these exceptions to warrant us in deciding that the three jurors who were objected to were legally incompetent to sit on the trial of the defendant. It does not appear that either of them was under any obligations, legal or honorary, to contribute any thing for the prosecution of this case. For aught that is shown, each of them may have paid, before this prosecution commenced, the full sum he had subscribed as a member of the Carson League. It therefore does not appear that either of them had any, even the smallest pecuniary interest in the event of the prosecution ; and the court, without evidence, cannot presume that they had. * * * * As the exceptions are framed, we cannot find in them enough to show that the judge at the trial was legally bound to set these jurors aside, although it might have been well if in his discretion he had done so."

To the same effect is *Commonwealth v. Thresher*, 11 Gray, 57, and *People v. Graham*, 21 Cal. 262, essentially modifying the decision in the case of *People v. Lee*, 5 Cal. 353, cited by counsel for defendants.

Applying the doctrine of these decisions to the facts in the case before us, we are of opinion that these jurors were not disqualified. We think that in all such cases there is vested in the judge trying the case a discretion, which, under the facts in each case, should always be exercised so as to insure that fairness in criminal trials to which the defendant is justly entitled—a trial by impartial jurors, and as intimated by the court in the case of *Commonwealth v. O'Neil*, *supra*, it would be well if in the exercise of a sound discretion jurors belonging to such associations should be excused in all cases where an intelligent and impartial jury can be impanelled in the community without the pale of such organizations.

But the bare fact that one is a member of an organization which is under no obligation or duty to unduly prosecute criminals, or persons charged with a particular crime, is not *per se* a legal disqualification affecting his competency to sit as a juror in the trial of such a case.

From all that is presented in the record before us, the jurors objected to were under no obligation, legal or honorary, to do more in the prosecution of this case than the law of the land imposes upon every good citizen in his duty to the State, and in the protection of his own and his neighbor's rights.

Judgment affirmed.

DUGGAN V. BLISS.

(4 Col. 223.)

Assignment for the benefit of creditors — condition for release.

An assignment for the benefit of creditors, requiring the creditors to release the assignor before receiving any benefit under deed, is void on its face.

REPLEVIN by assignee for benefit of creditors. The opinion states the case. The plaintiff had judgment below.

John W. Blackburn, for plaintiff in error.

V. D. Markham and Patterson & Campbell, for defendant in error.

STONE, J. The sole question to be decided in this case is whether the assignment made by James H. Grout is fraudulent and void on its face, as being calculated in law to hinder, delay and defraud his creditors for whose presumed benefit the assignment is made. The chief objection to the assignment arises out of a condition of release contained therein.

That portion of the deed providing for the execution of the trust by the assignee is as follows: * * * “out of the proceeds arising from the sale of the said property, goods, chattels and effects, as well as from collections, after paying the costs, charges, expenses and compensations aforesaid, he shall pay: *First*, All debts due by the said party of the first part to any of the following named persons: A. Bradley & Co.; Hibbard, Spencer & Co.; Adams & Westlake; William Blair & Co.; Thomas White; Comstock Castle; George Brond; George Tritch; Perry & Co.; Tappan & Co.; Manning, Bowman & Co.; N. M. Simmons; G. J. Cottrill; Craig Brothers & Chandler, who shall, within sixty days from and after the date of these presents, that is say, on or before the first day of August of the present year, execute to the party of the first part a full release to the amount of their respective claims. The said debts to be paid in full, if there be sufficient proceeds for that purpose, otherwise to be paid ratably and in proportion to their respective amounts. The above-named creditors being a full list of the

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creditors of the said party of the first part who have claims against him for account of his business aforesaid. *Second*, After fully paying and satisfying all such creditors as may have executed the release and discharge specified, in the time specified, then to pay and satisfy any of the above-named creditors who have refused or neglected to execute such release and discharge. *Third*, The surplus, if any, to be paid to the party of the first part, his heirs, executors and administrators." * * *

Does the condition of release affect the validity of the assignment?

This question, although raised for the first time in this State, is not a new question to the courts.

The innumerable business failures in the commercial world have, in the last fifty years, flooded the courts of this country and England with cases involving every conceivable question pertaining to the rights and liabilities of debtor and creditor under deeds and contracts growing out of bankruptcies, assignments of debtors and composition of creditors, among which the question raised in this case has, in our American courts, received its full share of discussion. We shall not attempt a full review of the cases involving this question, since it has been so frequently done in the leading cases, that a repetition here could add nothing to the stock of knowledge already possessed by the profession on this subject. Whether a condition of release in an assignment of the property of the debtor for the benefit of his creditors renders the deed fraudulent and void, either *per se* or as against objecting creditors under the statute of 13 Eliz. 5, has been variously held by the courts of last resort in the several States.

The English cases involving this precise question are so few and meagre, and so far modified by the policy of bankrupt laws, that they can scarcely be regarded as authoritative on the point in this country.

Counsel for defendant in error cite Burr. on Assignments (3d ed.), 232, as authority that "in England a stipulation in an assignment for the release of the debtor, as a condition of receiving the benefit of the deed, has been held valid even against a claim of the crown," but in support of this declaration the author of the text seems to rely solely upon the case of *The King v. Watson*, 3 Price (Exch.), 6, in which the principal question appears to have been, whether the assignment was not void under the bankrupt laws; and indeed

most of the English decisions in cases of assignment are affected by considerations arising out of their bankrupt system.

Looking to the decisions in the courts of the United States, we find considerable conflict of opinions, some supporting such assignments, but in the majority of cases where the precise question raised here has been distinctly passed upon, uncontrolled by other considerations in the case, they have been held illegal. Where they have been sustained, it has been generally in the first decisions on the subject in the earlier days of the republic, when our legal and commercial policy had but slightly departed from that of the mother country.

In Pennsylvania, Virginia and South Carolina, assignments for the benefit of such as shall release, are held valid, "being now too long established to be overthrown." 1 Am. Lead. Cas. (5th ed.) 83. In the leading Pennsylvania case, however, *Lippincott v. Barker*, 2 Binn. 174, Chief Justice TILGHMAN concludes, by saying: "I beg, however, to be distinctly understood, that my opinion is confined to the circumstances of the present case, for there are many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases;" while Judge BRECKENRIDGE, in a dissenting opinion, of ability and eloquence, pronounces the deed fraudulent and void.

The case of *Brashear v. West*, 7 Pet. 608, is strongly relied on in support of the validity of such assignments. But this case coming from Pennsylvania, the decision is based on the settled construction supposed to have been given to the law of that State by the case of *Lippincott v. Barker*, *supra*; and Chief Justice MARSHALL, who delivered the opinion, after stating that "the construction which the courts of that State have put upon a Pennsylvania statute of frauds, must be received in the courts of the United States," declares: "Yet we are far from being satisfied that upon general principles such a deed ought to be sustained."

The case of *Halsey v. Whitney*, 4 Mas., 206, has also been relied upon as authoritative on this point; but the learned Justice STORY, in delivering the opinion, stated the grounds on which his judgment was pronounced to be, that the decisions in Massachusetts had left the question up to that time *in equilibrio*, but that taking into consideration the great length of time during which stipulations of this nature had prevailed in that State without objection, there was much reason to believe that the profession had deemed the law

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settled in favor of the debtor on this point; and then he significantly adds: "I am free to say, that if the question was entirely new, and many estates had not passed on the faith of such assignments, the strong inclination of my mind would be against the validity of them."

The earlier cases in Maine, New Hampshire, Vermont, Rhode Island, and perhaps in Massachusetts, sustain the validity of such assignments, although the district court of Maine held the contrary doctrine in the case of *Lord v. Brig Watchman*, Ware, 242. For many years, however, the statutes of all those States, except perhaps Rhode Island, have prohibited assignments containing such conditions of release.

In the first case involving this question which came into the Supreme Court of Maryland, *McCall v. Hinckley*, 4 Gill, 129, the decree of the chancellor sustaining the assignment was affirmed by a divided court, but the learned and exhaustive opinion of DORSEY, J., against the validity of the deed, is unanswerable, and later decisions of that court, like those of Connecticut and Illinois, are to the effect that the requirement of a release as a condition of participation in the fund, the surplus resulting to the assignor, is fraudulent and avoids the deed. *Malcomb v. Hodges*, 8 Md. 418.

Among the States that hold squarely against the validity of release conditions in such assignments, are New York, Ohio, North Carolina, Georgia, Mississippi, Texas, Tennessee and Missouri.

The leading case in New York, and which has been followed by many of the other States, in the case of *Grover v. Wakeman*, 11 Wend. 190, which contains a full review of the authorities, English and American, and an elaborate and able discussion of the question upon principle, by a number of the twenty-four eminent jurists and senators who composed the Court of Errors of that day. By that and other decisions in New York, it has become the settled doctrine in that State, not only that a stipulation for a release as a condition of receiving a benefit under the deed, the surplus returning to the debtor, in exclusion of non-releasing creditors, is fraudulent, but that such a stipulation as a condition of preference, though the only penalty be the postponement of non-releasing creditors to others, avoids the deed. The principle established in *Grover v. Wakeman* and subsequent cases is that although preferences are allowed, the appropriation of the property to the use of the creditors must be absolute and unconditional, and

that the creation of a trust, that is to operate as a coercion of the creditors into a relinquishment of part of their demands, is fraudulent and void, though no portion of the property be reserved to the debtor's own use. The law of Ohio, and that of Missouri, go to the same extent. *Barrett v. Reed*, Wright, 701; *Atkinson v. Jordan*, 5 Ohio, 294; *Brown v. Knox*, 6 Mo. 302.

The earlier cases in Alabama were in support of such assignments, although the principle was condemned in several cases, but the later cases in that State have approved and adopted the general principle of *Grover v. Wakeman*, that an assignment for the benefit of creditors must be absolute and unconditional, without reserved benefit or attempted coercion. See 1 Am. Lead. Cas. 83.

It is insisted by counsel for defendant in error that the release clause in the deed amounts at most to a mere preference of creditors, "which right of preference has always and everywhere existed;" but we cannot take this mild view of the case. True, there is no reservation to the debtor of any portion of the property assigned, in terms, but there is none the less a reserved benefit to him in the discharge of debts which he contracted to pay; a benefit which he seeks to secure for himself by attempted coercion of the creditors through this very "preference." The debtor in this case in effect says to his creditors: Those of you who agree to release me from my obligations, can take all my property and divide among you; there may be enough to pay you in full, or may not; you take the chances of being paid in full or in part, the refusing creditors may get something; they take the chances of getting paid something or nothing; I take the surer chance of a discharge from my obligations in whole or in part." In short, the creditors take the doubtful chance of getting all they are entitled to, while the debtor takes the almost certain chance of paying less than he agreed to pay. If all the creditors should consent to release, there could evidently be no preference. So, too, if all should refuse. There is no absolute preference in the case.

Without expressing any opinion as to the validity of assignments creating preferences merely, it is sufficient to say that the preference here claimed is incidental to the attempted coercive discharge of the debtor. By such discharge, he reaps a certain benefit. He seeks, in effect, to legislate in his own interest; to make for himself a private bankrupt law, independent of statutory enactments. He seeks to execute this law he has made, and procure his own dis-

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charge by compelling his creditors to take what he has offered them. There is a positive delay of the creditors by placing the property out of the reach of their legal pursuit, and preventing a distribution within two months after the date of the deed. The creditors then are to be delayed in receiving the avails of property which ought to belong to them immediately upon its conveyance to the assignee. For whose benefit is this delay? Not for the creditors, for they will get no more after assenting to or refusing the conditions proposed than they would get at once, without any such condition. The delay is manifestly intended to benefit the debtor in order that he may secure the advantage of the coveted release to which he has no rightful claim.

In *McCall v. Hinckley*, cited *supra*, Judge DORSEY, of the Court of Appeals of Maryland, says: "That a model of such an assignment as that now before us could have been substituted for the old and the common form of a deed of composition, is strange, indeed. And it can only be accounted for by supposing it to be the cunningly devised invention of him, who, in stretching his ingenuity to rescue the debtor from the power and rights of the creditor, lost sight of the principles of both law and morality."

And Judge BRECKENRIDGE, in giving his opinion in *Lippincott v. Barker*, 2 Binney, 174 (4 Am. Dec. 444), declares that "it has been left to the *astutia Americana* of debtors to devise such a warehousing of effects out of the hands of the law for a time, for the benefit of particular creditors. I think it to the let and hindrance of creditors, and that such disposition is void, both at common law and by statute, though not fraudulent in fact in the particular case, yet fraudulent in law, and therefore void. It is not simply a surrender of his property as satisfaction *pro rata* of his debts, that the insolvent has in view. He couples an interest for himself in obtaining a discharge from that proportion of the respective debts which may remain unsatisfied. It is taking an undue advantage of the situation of the creditor to impose this condition. It is immoral to exact it. *Volenti non fit injuria* if the creditor accepts, but it is making a volunteer by compulsion, and is, in fact, a robbery. One enlightened on the principles of moral honesty would never think of it. He would give what he had to one or more, or to the whole of his creditors, but he would never think of annexing a condition precedent or subsequent to such surrender. Of such conditions, a chancellor would not compel a fulfillment. I

can think of nothing morally honest, or strictly legal, but the indefinite, unconditional surrender of the property. Pass this boundary, and I can draw no line where an assignment shall be supported and where not."

In *Grover v. Wakeman*, referred to *supra*, Justice SUTHERLAND expresses the views of the court upon this point as follows: "Where the assignor parts with all control over the property, and devotes it absolutely to the benefit of his creditors, without any reservation or stipulation for his own advantage, the honesty of his intention is so apparent, and the advantage to the creditor so direct and decisive, that they cannot be said to be obstructed or delayed in their remedies. But where, instead of distributing his property among his creditors as far as it will go, he places it beyond their reach by an assignment, not merely for the purpose of saving it from one particular creditor to be given to another, or to be equally divided among all, but for the purpose of enabling him to extort from some or all of them an absolute discharge of his debts as the condition of receiving a partial payment, he perverts the power to a purpose which it was never intended to cover, and which the principle, on which the right to give preferences is founded, will not justify. Why should a debtor be permitted in this way to operate on the fears of his creditors and coerce them into his own terms? It has sometimes been said in answer to this view of the case, that there is nothing immoral or unjust in a debtor in embarrassed circumstances, and who is unable to pay all his debts, making the best arrangements in his power with his creditors, and giving the largest dividend, or the whole, to those who will settle with him on the best terms; and if he can do this while he retains his property in his own hands, there is no reason, it is said, why he should not be permitted to do it under cover of an assignment.

Parties not under legal disabilities may make such contracts as they please, and if supported by a consideration and there is no fraud in the case, they will not be disturbed. * * * But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits, by putting his property in the hands of trustees with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all liability."

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Judge VAN NESS, in *Hislop v. Clark*, 14 Johns. 458, states what I consider to be the sound principle upon this subject. He says an insolvent debtor has no right to place his property in such a situation as to prevent creditors from taking it under the process of a court of law and to drive them into a court of equity, where they must encounter expense and delay, unless it be under very special circumstances and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution of his estate to be made among them all. Judge SPENCER, in *Austin v. Bell*, 20 Johns. 442 ; 11 Am. Dec. 297 ; and Chancellor KENT, in *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329, obviously concurred in the soundness of that proposition. The Supreme Court of Errors in Connecticut adopted it in *Ingraham v. Wheeler*, 6 Conn. 277, and it was most happily and impressively amplified and illustrated by the learned judge of the U. S. District Court for the State of Maine, in the case to which I have referred. *Lord v. Brig Watchman Ware, supra*. "After the maturest reflection upon this subject, I have come to the conclusion that the interests, both of debtor and creditor, as well as the general purposes of justice would be promoted, if the question is still an open one, by confining these assignments to the single and direct appropriation of the property of the debtor to the payment of his debts."

And Senator TRACEY, sitting in *Grover v. Wakeman*, declares: "The law does not recognize any right on the part of an insolvent debtor, to an absolute discharge from his creditors on distributing among them his estate. One who contracts a debt agrees not merely that he will pay it if his present property is sufficient, but also if his future exertions shall give him the power. In short, he pledges but the property he possesses, and his capacity to acquire property."

We have quoted thus much from the matured opinions of eminent jurists, in some of the leading cases covering the question we are considering, realizing the impossibility of expressing so well and forcibly in any language of our own, the doctrine and principles which we think must apply in this case. Colorado has no statute law relating to bankruptcy, or governing the disposition of the estates of insolvent debtors. The question here considered is therefore an open question and must be settled by the principles of enlightened justice as well as by the principles of the common law, under the statute of 13 Elizabeth, as interpreted and applied by the highest courts of the country ; and in the conflict of authorities

upon the subject, we think it will be found that the great weight of reason and authority is against the validity of assignments imposing such conditions. A late law writer lays down the doctrine upon this subject thus: "A condition in a deed of assignment requiring the creditors to release the assignor from all claims before receiving any benefit under the deed, the surplus returning to the debtor, and not to the non-releasing creditors renders the deed fraudulent and void; and such a stipulation as a condition of preference, although the only effect is to postpone the non-releasing creditors to a share of the surplus, renders the assignment void. The principle is, that although preferences are allowed, yet the appropriation of the property to the creditors must be absolute and unconditional, and a trust which coerces the creditors into a relinquishment of part of their claims, in order to enjoy any benefit under the deed, is fraudulent and void, although no portion of the surplus may go to the grantor." 2 Perry on Trusts, § 592.

Numerous authorities are cited in support of the doctrine of this text. And in Burrill on Assignments, the most complete work on this subject extant, the author, upon an elaborate review of the authorities upon the question before us, says (2d ed., p. 172): "Taking into consideration the opinion expressed by Chief Justice MARSHALL, in *Brashear v. West*, 7 Pet. 608, it seems probable that should a case be brought before the Supreme Court of the United States, which could be decided on general principles and free from the controlling influence of State construction, the decision would be against the right to stipulate."

Many of the States have legislated upon this subject during the past forty years, and by statutory enactment have prohibited the making of assignments containing reservations, release clauses, and even preferences. This may be taken as an indication of prevailing sentiment, touching the principles involved in such transactions, as well as a reflex of the weight of judicial decisions.

It is conceded that in this case there is no fraud in fact, and the question therefore is, whether upon the face of the deed itself the assignment is fraudulent in law.

In view of the recent repeal of the National Bankrupt Act, the absence of local laws upon the subject, and the consequent necessary settlement of the affairs of insolvent debtors outside the guiding control of legislation, we have given to this case that consideration which its manifest importance has seemed to demand, and we can-

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not avoid the conclusion that its determination should be in accordance with the weight of judicial authority, the tendency of modern legislation, and the growing spirit of the law in favor of exact justice between debtor and creditor.

We must therefore hold the deed in question fraudulent and void.

The judgment of the court below will be reversed, and the cause remanded for further proceedings not inconsistent herewith.

Judgment reversed.

PULLMAN PALACE CAR CO. V. BARKER.

(4 Col. 344.)

Damages—remote—negligence.

Owing to the defendant's negligence, their sleeping car, on which a woman was a passenger, caught fire, and she was compelled to leave the car, half clad, and took cold, which resulted in suppression of her menses and a long illness. It being shown that she was menstruating at the time of the accident, and that the illness was traceable to that condition, *held*, that the defendant was not liable in damages therefor. (*See note, p. 92.*)

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Butler & Wright, for appellant.

Symes & Decker, for appellee.

ELBERT, J. This was an action on the case brought by Diana Barker against the appellant for injuries sustained by reason of alleged negligence.

The controversy, as presented by the record, respects the extent, not the fact of the appellant's liability. While the law, out of regard for human life and safety, exacts from the carriers of passengers the utmost care and skill, it refuses to take into consideration damages remotely resulting from a breach of their contract or neglect of their duty. The maxim is *causa proxima, non remota spectatur*.

In cases of contract as well as cases of tort, where no question

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arises of fraud, malice or oppression, the loss or injury for which compensation is sought must be the natural and proximate consequence of the alleged breach or wrongful act. Sedg. Meas. Dam. 57 *et seq.*; Shearm. and Redf. on Neg., § 595 *et seq.*

What is the proximate cause of an injury in a legal sense is often an embarrassing question, involved in metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life.

The proximateness required is not the greatest possible; the negligence to which the responsibility attaches may sometimes concur with or precede other agencies in producing an injury. A result may be, physically, secondary and consequential, and yet in legal contemplation be proximate. As a consequence the rule is vague and of difficult application. As said by BRAMWELL, B., "it is sometimes like having to draw a line between night and day; there is a duration of twilight when it is neither night or day." Each case of this description must be decided with reference to the circumstances peculiar to it.

The question as presented in the case at bar is not without difficulty.

The sleeping car of the appellant caught fire in the night and was burning, through the negligence of its employees; the appellee, with her husband, occupied a berth which the flames had already reached, when she was awakened. The suddenness of the alarm and the imminency of the danger from the smoke and approaching flames left no time for the appellee to properly clothe herself; she left the burning car with but slight clothing, and in her stocking feet; in passing to the next car she was compelled to stand for a minute or two on the platform of the car; it was an extremely cold night in January, and by reason of this exposure she caught a severe cold which caused the cessation of her menses, and resulted in a long period of illness.

Was this illness, in legal contemplation, the proximate result of the negligence of the appellant, for which the appellee may rightfully demand compensation?

In the case of *Milwaukee, etc., Railway Co. v. Kellogg*, 4 Otto, 475, Mr. Justice STRONG says: "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the fact constitute a continuous succession of events so linked together as to make a natural whole, or

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was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in order to warrant a finding that negligence or an act not amounting to a wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not, when there is not a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of a sufferer must be to the originator of the intermediate cause. * * * * The inquiry must therefore always be whether there was any intermediate cause disconnected with the primary fact and self operating, which produced the injury."

The long illness of the appellee, as shown by the evidence, was of such a character as results from arrested menstruation. Independent of the fact that she was "unwell" at the time, it cannot be said that the negligence of the appellant resulted in her long illness or any illness. Conceding that the appellee was compelled on account of the smoke and flames to leave the car in the half-clad condition she did, the exposure to the cold was the direct and necessary result of the appellant's negligence. Her subsequent illness, however, was not the result of the exposure, but the result of the exposure in her then condition. Here, then, intervenes an independent cause of her illness, a cause resting in her physical condition, appertaining exclusively to herself, with which the appellant had no concern, and to which it sustained no relations either by contract or by the general duty imposed by law upon carriers of passengers. Where physical weakness or disability is apparent to, or is brought to the attention of the carrier, undoubtedly that high degree of care which the law imposes upon him, would, under certain circumstances, involve duties in reference thereto. As that he shall allow an aged, infirm, or crippled person, a reasonable time in which to get on or off the coach or car, having reference to their crippled or infirm condition. *Colt v. Sixth Ave. R. R. Co.*, 33 N. Y. Sup. Court, 190.

While this is the case it cannot be said that the law imposes any

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duty respecting the possible secret complaints and diseases of passengers affecting their fitness to travel. Where no duty is imposed, no liability can attach. Another passenger might have suffered equally serious consequences from the effect of the cold upon a wound in the foot, superinducing inflammation, and possibly necessitating amputation. Can it be said that the law imposed upon the carrier an enlarged duty having reference to the wound, and that the added risk of travelling in this condition must be assumed by him and not by the passenger from whose personal condition it springs? We think not. While it is true that menstruation is a law of health, it is also true that it is a condition requiring greater care and prudence to avoid exposure.

“The cars of a railroad company are not hospitals, nor their employees nurses.” Persons who are ill have a right to enter the cars of a railroad company and travel therein; as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions affecting their fitness to journey, certainly, where they are unknown to the carrier, must rest upon their own shoulders. *New Orleans, etc., R. Co. v. Stratham*, 42 Miss. 613; *Hobbs v. London, etc., R. Co.*, L. R., 10 Q. B. 111.

The illness of the appellee, as shown by the evidence, was traceable to her physical condition at the time of the accident, and was not the subject-matter of damage. It was a remote, and not a natural or proximate result of the appellant's negligence.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Judgment reversed.

NOTE BY THE REPORTER. — In *Hobbs v. London, etc., Ry. Co.*, L. R., 10 Q. B. 111, the plaintiff, with his wife and two children, took tickets to H. on the defendants' railway. They were set down at E. It being late at night, the plaintiff could not get a wagon nor accommodation at an inn. They had therefore to walk five or six miles on a rainy night, and the wife took cold, was laid up in bed for some time and was unable to assist her husband. The jury found 8*l.* for inconvenience in having to walk home, and 20*l.* for the wife's illness and its consequences. The court held the 8*l.* recoverable, but not the 20*l.*

The circumstances in *Indianapolis, etc., Ry. Co. v. Birney*, 71 Ill. 391, were very similar to those in the *Hobbs* case, except that in the latter the plaintiff “had the option to remain five or six hours and take the next train, or procure a horse or a horse and carriage;” and the opinion is based on the ground that his exposure was voluntary and unnecessary.

See 1 Sedgw. on Meas. of Dam. (7th ed.), 218, note a; Wood's Mayne on Dam. 67, note 2; Thomp. Carriers of Passengers, 565.

Mr. Thompson (Carriers of Passengers, 566), says of the *Hobbs* case: “The rule seems to have been applied with unnecessary rigor.” He also cites *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7, where a passenger carrier contracted to carry a young lady from a railway station to her house, but set her down in the city, a mile from her residence, on the

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sidewalk of a frequented street, along which ran a line of street cars passing within a square of her house. The day was very cold but dry; the young lady was delicate but not ill. Being warmly clad, she walked home with a friend, and in so doing took a cold which permanently impaired her health. It was held that this injury was too remote to warrant a recovery against the defendant.

But where the defendant contracted to carry the plaintiff from New York to San Francisco *via* Nicaragua, but in consequence of the wreck of the connecting vessel on the Pacific coast he was detained several weeks on the Isthmus, where he contracted a local fever, which disabled him for a long time after his return to New York, this injury was held a ground of recovery. *Williams v. Vanderbilt*, 28 N. Y. 217.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

REVIERE V. POWELL.

(61 Ga. 80.)

Evidence — res gestæ — memorandum.

A memorandum or entry made in the book of a banker or merchant at the time of the transaction, and in the presence of all the parties — plaintiff and defendants — is part of the *res gestæ*, and the book is admissible in evidence to show it, and to corroborate the memory of witnesses.

ACTION on a check. The opinion states the facts. The defendants had judgment below.

Hunt & Taylor, for plaintiff in error.

B. M. Turner and *Speer & Stewart*, for defendants.

JACKSON, J. This was a suit for \$225 on a check, for that much money deposited by the plaintiff with the defendants. The issue was whether the money called for by the check had been paid in settlement or not. The jury found for the plaintiff, the defendants moved for a new trial, it was granted, and plaintiff excepted.

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The motion was predicated on two grounds: first, that the court erred in rejecting a certain book of Powell & Murphy which showed an entry of the \$225 sued for, and its payment in the settlement; and secondly, that the verdict is strongly and decidedly against the weight of the evidence. It is not stated upon which ground the new trial was granted, but we suppose upon both.

1. Should the book have been admitted? We think so. The entry was made at the time of the transaction, and in the presence of all the parties, the plaintiff included, according to the statement in the record. It was therefore a part of the *res gestæ* — a memorial made at the time of what transpired, in a form more durable and less liable to mistake than mere human memory. Any such memorial made at the time, and in the presence of parties, upon any thing — wood, stone or paper — is evidence, and admissible, especially in a case where human recollection differs, in order to strengthen the one side or the other, as the memorial may corroborate the one or the other. It is immaterial who made it, so that it was made at the time and in the presence of the parties at variance. It is stronger therefore than the case of an ordinary entry on the books of a banker or merchant; but even in such ordinary case, this court has not held that since parties may be sworn, books are not admissible. See *Petit v. Keel*, 57 Ga. 145. But this entry stands on a different footing upon the facts stated in the motion for a new trial, and is admissible as part of the *res gestæ*, as a memorial made by the parties, and in their presence at the time the transaction occurred. So we think that the judgment was right on this ground.

[Omitting the other point.]

Judgment affirmed.

CITY OF AUGUSTA V. HAFERS.

(51 Ga. 48.)

Municipal corporation—negligence—evidence.

In an action against a municipal corporation for injuries resulting from falling into a cellar door on one of its sidewalks, left open by the owner of the property on its street, there are two questions for the jury: First, is the system adopted by defendant in regard to allowing cellars on its sidewalks reasonably calculated to insure the safety of those who travel thereon by night or

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day ? Second, if so, is the defendant liable in the special case by reason of negligence in the owner, coupled with notice, actual or constructive, to the city ?

On the question whether the system adopted by the city in regard to allowing cellars on its sidewalks was reasonably calculated to insure the safety of those who travel thereon, evidence that children upon different occasions had previously fallen into such openings, was admissible.

ACTION of negligence. The opinion states the case. The plaintiff had judgment below.

Barnes & Cumming and J. C. C. Black, for plaintiff in error.

W. R. McLaws and H. Clay Forster, for defendant.

WARNER, C. J. This was an action brought by the plaintiff against the defendant to recover damages for its alleged negligence in allowing one Goldsby, the owner of a lot on Broad street in the city of Augusta, to keep open a cellar door, whereby the plaintiff, in walking along the sidewalk on said street, fell into said cellar and was injured. On the trial of the case, the jury found a verdict in favor of the plaintiff for the sum of \$500. A motion for a new trial was made on the grounds therein stated, which was overruled, and the defendant excepted.

1, 2. This is the second time this case has been before this court. According to the ruling of this court, when it was here before, there were two questions to be submitted to the jury: First, was the system adopted by the defendant in regard to allowing cellars on its sidewalks, in front of the business houses thereon, reasonably calculated to insure the safety of those who travel on them either by day or night ? Second, was the defendant liable to the plaintiff for negligence in allowing the use of the cellar by the owner thereof, under the evidence in the case, according to the ruling of this court in *Chapman v. Mayor, etc., of Macon*, 55 Ga. 566 ? See 59 id. 154. In the case of *Chapman v. Mayor, etc., of Macon*, it was held that if the opening of the cellar door by the owner thereof, was a single act of negligence, the city would not be liable, because it would not be charged with knowledge, nor could notice in fifteen minutes be given to it. But if the owner had been for a long time careless and negligent, the city would be presumed to have notice. The court charged the jury amongst other things, "If you find that the system of cellars with covered

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doors in the sidewalks, as adopted by defendant, to be reasonably safe and secure, it is then for you to ascertain whether the defendant was guilty of negligence in the use of the cellar by the occupant or owner thereof; and if you find that the defendant has been guilty of negligence, you should give such damages as to fully compensate the plaintiff for all injuries sustained." This charge of the court, in view of the evidence in the record, was error. The question, according to the ruling of this court, was not whether "the defendant was guilty of negligence in the use of the cellar by the occupant or owner thereof," but the question to have been submitted to the jury, was whether the defendant was liable to the plaintiff in damages for negligence in allowing the use of the cellar by the owner thereof, under the evidence in the case, when applied to the law as ruled by this court in *Chapman v. Mayor, etc., of Macon*, before cited.

3. The evidence of Harker that "he had seen a child walk backward and fall into Dr. Campbell's cellar, and also that he had seen another such instance five or six years before," may be considered as bearing remotely upon the question as to the reasonable safety of the defendant's sidewalks according to the system adopted by it in regard to cellars thereon in front of business houses, and was therefore admissible for what it was worth in that connection. The overruling of the defendant's motion for a new trial was error.

Let the judgment of the court below be reversed.

Judgment reversed.

HOLLY V. ATLANTA STREET RAILROAD.

(61 Ga. 215.)

Carrier — negligence — street railroad company.

Street railroad companies are carriers of passengers, bound to extraordinary diligence, and liable for negligence of their agents and employees in and about such carriage; and when passengers are injured by riotous fighting among other passengers, the question of negligence is one of fact, and a declaration alleging negligence in the company, in the failure to have a conductor aboard to preserve order, and in the failure of the driver to suppress the fight or to eject the combatants, is good, and should not be dismissed on demurrer.*

* See *Weeks v. N. Y., N. H. & H. R. R. Co.* (72 N. Y. 50), s. c., 28 Am. Rep. 104, and note, 112.

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ACTION of negligence for personal injury. The opinion states the case. The defendant had judgment below.

M. deGraffenreid, for plaintiff in error.

Hopkins & Glenn, for defendant.

JACKSON, J. This was a demurrer to the plaintiff's declaration, which alleged to the effect that the plaintiff was a passenger on one of the defendant's cars; that two men got to fighting thereon; that she attempted to get off the cars, and in doing so was caught in the door of the car by the persons fighting, and was badly hurt by being severely mashed and bruised; that the defendant was negligent in failing to provide any conductor to preserve order on the car, and that the driver was negligent in failing to suppress the fight or to eject the combatants, or otherwise to come to her assistance or interfere to preserve order. The court sustained the demurrer, and the plaintiff excepted.

We think that the case should have been submitted to the jury. Under our law, Code, § 2067, "a carrier of passengers is bound to extraordinary diligence, on behalf of himself and his agents, to protect the lives and persons of his passengers. But he is not liable for injuries to the person after having used such diligence." The absence of diligence is negligence or neglect; and these questions of diligence and negligence are questions for the jury upon the facts of the case made. The declaration alleges neglect—total want of diligence in two particulars; first, in providing no conductor, and secondly, in having a driver who was careless of the safety and comfort of this female passenger, in that he made no attempt to stop the fight or to eject the fighters. Whether or not these carriers, who have intrusted to their care thousands of passengers, of all ages, sexes and conditions in life, should provide a conductor or other escort in addition to the driver, is a question of diligence or negligence for the jury, and whether the driver used extraordinary diligence to protect the person of this lady is peculiarly so.

These questions should have gone with the proof the respective parties might have made, to the jury, and they should have passed upon them. It is true that, as argued for defendant in error, there may be a difference between railroads, on which cars are propelled by steam across the country, and these street railroads in cities; but both are carriers of passengers, and liable for slight neglect, or

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the absence of extraordinary diligence. And their duty to their passengers, in caring for their safe and comfortable conveyance from point to point, is the same.

Whether this duty was discharged in this case is for the jury to say, under all the facts thereof.

That carriers are bound when injuries arise from other passengers, and the common protector of all is wilfully negligent by his agents and servants to interfere, seems to be established by the authorities cited by the counsel for the plaintiff in error. See 53 Penn., 512; 6 Blackf. 158; 55 N. Y. 108; s. c., 14 Am. Rep. 190; 53 Miss. 201; s. c., 24 Am. Rep. 689.

Judgment reversed.

CALHOUN V. MARSHALL.

(61 Ga. 275.)

Interest — payable annually — interest on.

Upon a contract to pay interest annually on the 15th of May, the interest may be recovered without regard to the time when the principal debt falls due; and upon such annual interest, interest is collectible from the time when it should have been paid. (*See note, p. 101.*)

FORECLOSURE. The opinion states the point. The plaintiff had judgment below.

A. Johnson, for plaintiffs in error.

Dabney & Fouche, for defendant.

JACKSON, J. The sole question made by this record is whether notes, the interest on which was made due and payable annually at a certain date each year, bore interest upon the annual interest so due, as well as upon the original principal on the final calculation of balance due on said notes.

Our Code, § 2056, provides that “all liquidated demands where, by agreement or otherwise, the sum to be paid is fixed or certain, bear interest from the time the party is liable and bound to pay them.” These annual sums for interest are fixed and certain, and

the party was bound to pay them on the 15th of May each year ; so that the liability for interest is within the words of the act. If notes for this annal interest had been separately given, they could have been sued for and recovered separately from the principal ; and such notes would have borne interest. What difference can it make that the same contract is as clearly expressed in the same paper where the promise is also made to pay the principal debt at a time certain ? Suit could have been brought for the interest on the 15th of May of each year as well on these as on separate notes ; and the notes which contained a promise to pay the principal debt at a certain date, and this annual interest in May, would have been evidence of the promise to pay the interest then, just as certain and complete as if promised in a separate note. There can be no difference in principle.

In *Scott v. Saffold*, 37 Ga. 384, it was held in effect that a contract which contained the words, “interest to be paid annually at 10 per cent, otherwise counted as principal” was good, and that interest upon the annual interest arising under said contract was collectible.

That case is like this, except that the words “otherwise counted as principal” are not in the notes here sued on ; but the legal effect of the two contracts is the same. The promise to pay a sum certain at a certain time is as distinct in the one as in the other case, and the effect of that promise, to wit: to bear interest if not paid, is as complete in the case at bar as in the case of the 37th.

A man might give another a note for ten thousand dollars payable at the end of ten years, with interest payable annually, and yet refuse to pay any interest at all as it fell due ; would it be right, when the final accounting came, to let him profit by not keeping his promise to pay the interest annually ? Could not the payee sue for the interest every year and recover it ? And would not the payee be entitled to recover interest from the time each installment fell due, up to the time payment thereof was made ? We think so. It stands upon the same principle, really, as coupons upon bonds ; and as these fall due they are recoverable with interest on them for delay.

There seem to be two lines of authority in our sister States, and many cases have been cited by counsel on each side ; but we rest our judgment upon our own statute, and the case in 37th Ga.

Judgment affirmed.

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NOTE BY THE REPORTER. — In *Hastings v. Wiswall*, 8 Mass. 455, it was held that upon a note made payable in a certain number of years, with interest annually, judgment can be recovered only for simple interest on the principal sum; the court observing that the plaintiff might have brought his action for the interest at the expiration of each year, and that by neglecting this he might be considered as waiving his claim to compound interest. This was followed, with a more elaborate consideration by SHAW, C. J., in *Ferry v. Ferry*, 2 Cush. 92, and in *Henry v. Flagg*, 13 Metc. 65. To the same effect, *Sparks v. Garrigues*, 1 Binn. 152, 165; *Doe v. Warren*, 7 Greenl. 48. In the latter case, it was said: Interest "is an accessory or incident to principal. The principal is a fixed sum; the accessory is a constantly accruing one. The former is the basis or *substratum* from which the latter arises, and upon which it rests. It can never by implication of law sustain the double character of principal and accessory. Whatever the plaintiff recovers beyond the face of the notes, the sum originally due, he recovers as interest. No part of it then has yet become principal, nor can it be so regarded. After interest however has accrued, the parties, may by settling an account, turn it into principal. It is then in the nature of a new loan; but it does not become principal, by operation of law, merely because it is due." To the same effect is *Mowry v. Bishop*, 5 Pal. 98, where it is said, "if it is voluntarily paid by the debtor, although such payment could not have been legally enforced independent of such subsequent agreement, it never can be recovered back." To similar effect, *Stokely v. Thompson*, 34 Penn. St. 210; *Niles v. Board*, 8 Blackf. 158; *Young v. Hill*, 67 N. Y. 162; s. c., 23 Am. Rep. 99.

In *Pindall's Ex'r v. Bank of Marietta*, 10 Leigh, 481, it was agreed that the principal should first be paid, the interest meantime remaining unpaid. It was held that interest could not be recovered on the interest, there being no agreement therefor.

The doctrine of the principal case was held in *Pierce v. Rowe*, 1 N. H. 179, where the question was considered at length by WOOLBURN, J. It was said: "The debtor was from that time culpable for not paying it, and must be presumed to have employed it, as well as the principal, to his own profit." The doctrine of waiver, in *Hastings v. Wiswall*, *supra*, was disapproved, the court observing, "If it proves any thing, it proves too much. On this principle, the creditor, unless he prosecute as soon as it becomes payable, a note which does not mention interest, may be said to waive any interest accruing on the note after it becomes due." (This case, however, was disapproved by SHAW, C. J., in *Ferry v. Ferry*, *supra*.) The same was held in *Catlin v. Lyman*, 16 Vt. 44; *Taliaferro's Ex'rs v. King's Adm's*, 9 Dana, 331, and in *Gibbs v. Chisholm*, 2 Nott & McC. 88; 10 Am. Dec. 560, by BAY and NOTT, JJ., JOHNSON, J., dissenting; *Sparks v. Garrigues*, was disapproved and *State of Conn. v. Jackson*, 1 Johns. Ch. 13, distinguished on the ground that it was a case of compound interest. The same was followed in *Singleton v. Lewis*, 2 Hill (S. C.), 408; *Kennon v. Dickens*, Cow. 357, and in *Fitzhugh v. McPherson*, 3 Gill, 408. In the latter case it is said, "when interest has once accrued it becomes a debt." To the same effect is *Bledsoe v. Nixon*, 69 N. C. 82; s. c., 12 Am. Rep. 642, where it is said, "By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest." In *Mann v. Cross*, 9 Iowa, 327, where interest was payable annually, it was held that interest upon the interest was recoverable at the statutory but not at the conventional rate. *Pierce v. Rowe*, *supra*, was cited. To this effect is also *Cramer v. Lepper*, 28 Ohio St. 59; s. c., 20 Am. Rep. 756. In *Wheaton v. Pike*, 9 R. I. 482; s. c., 11 Am. Rep. 227, interest was allowed on the overdue installments of interest, but not after the maturity of the principal.

WILLIAMS V. STATE.

(61 Ga. 417.)

Concealed weapons — defective pistol

A statute makes it penal to carry about the person, unless in an open manner and fully exposed to view, any pistol except a horseman's pistol. The main-spring being disabled so as to render a discharge of the weapon impossible in the ordinary mode of using fire-arms, is no excuse or justification.*

CONVICTION of carrying a pistol concealed about the person. It was shown that the main-spring of the lock was broken, rendering a discharge in the ordinary manner of firing a pistol impossible.

P. G. Thompson, for plaintiff in error. :

T. W. Rucker, for the State.

BLECKLEY, J. Section 4527 of the Code reads as follows : "Any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol (except horseman's pistols), dirk, sword in a cane, spear, bowie-knife, or any other kind of knives manufactured and sold for the purpose of offense and defense, shall be guilty of a misdemeanor, etc." What is the meaning of "any pistol?" This is the sole question. "The ordinary signification shall be applied to all words, except words of art, or connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such trade, or with reference to such subject-matter." Code, § 4. Pistol is a word in general use by the whole population, and is consequently to be understood in its ordinary signification. With this as a standard, any object which would usually be called a pistol in speaking of it, is a pistol. An object once a pistol does not cease to be one by becoming temporarily inefficient. Its order and condition may vary from time to time, without changing its essential nature or character. Its machinery may be more or less perfect; at one time it may be loaded, at another empty. It may be capped

*See note, 25 Am. Rep. 562; *Hutchinson v. State*, ante, p. 1.

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or uncapped ; it may be easy to discharge or difficult to discharge, or not capable, for the time, of being discharged at all ; still, while it retains the general characteristics and appearance of a pistol, it is a pistol, and so in common speech would it be denominated. If a pistol in the ordinary sense of the term, and not of that class known as horseman's pistols, it cannot lawfully be carried about the person, unless in an open manner and fully exposed to view. The main-spring being disabled, so as to render a discharge of the weapon impossible in the ordinary mode of using fire-arms, is no excuse or justification, concealment in carrying being interdicted by the statute whether the machinery of the lock be sound or unsound. In this ruling we decide differently from what was held by the Supreme Court of Alabama on a similar point, in *Evans v. State*, 46 Ala. 88 ; but while we regret to have so respectable a precedent against us, we have convictions both as to the meaning and policy of our statute which, for us, are decisive.

Judgment affirmed.

RAY V. BURBANK.

(61 Ga. 505.)

Negligence — compounding of prescription by druggist for animal.

Where a druggist, in good faith, recommends a prescription not as his own, but as that of another named person, and thereupon is ordered by his customer to fill it, and does so, charging only for the medicines and for compounding them, he is not responsible to the customer for any damage which may result from the use or administration of the remedy by the latter.

ACTION of negligence for injury to horse. The defendants, druggists, compounded for plaintiff a prescription for a disease with which his horse was affected. They truthfully stated to him that it was a prescription prepared by one Mann, which Mann had used with success, and they recommended it to plaintiff. He applied it to his horse, and the horse was damaged, wherefore he brought suit. The defendants had judgment below.

Ivy F. Thompson, J. R. Barber and Alexander & Wright, for plaintiff in error.

E. N. Broyles, for defendants.

BLECKLEY, J. [After stating the facts and evidence.] There seems to be no reason to question the good faith of the druggist. To fill a prescription is to furnish, prepare and combine the requisite materials in due proportion as prescribed. It is urged that prescriptions refer to medical provision for human beings, and do not appertain to the medication of animals, or, at least that they can proceed only from professional sources, and are not prescriptions if they emanate from common persons. Why a recipe or formula for the treatment of horses may not be called a prescription we do not see, from whatever source it may proceed. Life and health are physical, and are common to man and brute, and a plain, unscientific person may prescribe with less skill than a physician or a veterinary surgeon, but at times, perhaps, with equal efficiency. At all events, the owner of a horse is entitled to choose his medicine, and if he chooses it on the mere recommendation of a druggist, and the druggist is guilty of no bad faith, the failure of the medicine is simply a misfortune. The evidence is not necessarily convincing that there was want of skill in the act of compounding, or any departure from the recipe either in selecting or combining the materials. All that can be certainly said is, that in the given case the remedy proved disastrous.

Judgment affirmed.

MAHER V. MILLERS.

(61 Ga. 556.)

Contract — validity.

A contract was made between employers on the one hand and a clerk and a drayman on the other, for the delivery of sacks of meal and flour from the mill of the former, whereby the clerk was to make out and send with each dray load a correct note of the number of sacks put upon the dray, and any excess of sacks delivered by the drayman above the number noted in the ticket was to be credited to the drayman and charged to the clerk, and any deficiency was to be charged to the drayman and credited to the clerk, the clerk's place being in the mill, and the drayman not being allowed to enter it. *Held*, not immoral or illegal.

ACTION on contract. The facts are sufficiently stated in the head-note and opinion. Defendants had judgment below.

J. Ganahl, for plaintiff in error.

H. Clay Foster, for defendant.

Maher v. Millers.

BLECKLEY, J. The contract was somewhat peculiar, but its object evidently was to prevent any combination between the clerk and the drayman, to keep down disputes and to stimulate the vigilance of each in seeing that the count at the mill and the ticket representing the count were correct. The rule established was something like that which is said to prevail with banks, or some of them, of requiring mistakes to be rectified at the counter before the customer withdraws. The clerk and drayman were put upon equal and similar terms. Each assented to the terms as a part of the contract of employment, and the purpose was to secure not outcounting but correct counting. The sum of the matter was that the clerk's ticket was to be conclusive evidence to discharge the clerk and charge the drayman; and as the effect of this was to give the clerk the benefit of all short deliveries, if any by chance should occur, and to burden the drayman to that extent in favor of the clerk, it was but fair and equal, on the other hand, to give the drayman the benefit of all over-deliveries that might by chance occur, and to burden the clerk to that extent in favor of the drayman. The standard was the ticket, and by that the proprietors of the mill settled with both parties. The proprietors claimed neither more nor less than the ticket called for; if the drayman produced less at the point where his dray was unloaded the clerk was credited just as if all had been produced, and the drayman had to make good the deficiency; if he produced more, the proprietors did not take the benefit of the excess, but gave the drayman credit for it, and charged it to the clerk. The shorts were thus thrown on the drayman, and the longs on the clerk. The drayman received from the clerk at the door of the mill, outside of the building, and had no right to enter. The clerk's place was on the inside; these positions were assigned to the parties by the regulations. Not only was it the clerk's duty to protect himself by diligence in counting the sacks and in making out the ticket, but, as he was in charge of the stock and of the room which contained it, it was equally his duty to guard against theft by the drayman. He should have seen that the drayman did not enter but kept on the outside when he came for a load and a ticket. The terms of the contract were not immoral or illegal.

[Omitting another question.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PHOENIX INSURANCE CO. v. TUCKER.

(92 Ill. 64.)

Insurance—leaving premises vacant.

The owner of an insured dwelling-house, wishing to leave the State, rented the premises, possession to be delivered on Saturday. On the next preceding Friday he sold such personal property as he did not wish to remove, and his family left the premises permanently. He remained on the premises, retaining a bed and bedding and a few other articles of household furniture of small value, until Saturday night, at nine o'clock, the tenant not having taking possession, and then went to a city, a mile distant, and spent the night with his family, who were temporarily sojourning there. On Sunday he returned to the premises and then stayed until seven o'clock P. M., when he again went to the city and spent the night, leaving the said furniture in the house. That night the house was destroyed by an incendiary fire. *Held*, that the court could not determine as matter of law that the premises were vacant and unoccupied, within the meaning of the insurance policy, but it was a question of fact.

ACTION on fire policy. The opinion states the case. The plaintiff had judgment below.

Rowell & Hamilton, for appellant.

M. W. Packard, for appellee.

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MULKEY, J. This is an appeal from a judgment rendered in the McLean county Circuit Court, in favor of appellee, and against appellant, upon a policy of insurance against loss or damage by fire, issued by the latter upon the dwelling-house of appellee situated on a small fruit farm about a mile south of the city of Bloomington.

[Omitting minor points.]

Again it is objected, that in violation of a condition in the policy, the house, at the time of its destruction by fire, was vacant and unoccupied. If this be true as a fact, it is fatal to appellee's right of recovery, and the judgment of the court below must, for that reason if no other, be reversed. The policy in question, among other provisions, contains the following: "And it is agreed and declared to be the true intent and meaning of the parties hereto, that if the above mentioned premises * * * be vacant or unoccupied or not in use, unless agreed to by this corporation in writing upon this policy, from thenceforth so long as the same shall be vacant or unoccupied, or not in use, or the hazard otherwise increased, * * * this policy shall be of no force or effect."

It appears, from the evidence, that on the night of November 15, 1874, the same being Sunday, the dwelling-house covered by the policy was destroyed by fire. The destruction was total, and evidently the work of an incendiary. On the Thursday night previous, an unsuccessful attempt had been made to destroy it in the same way, but it was discovered by appellee in time to extinguish the fire before any serious damage occurred.

It further appears from the evidence, that some time before the loss appellee had determined to leave the premises and move to Nevada, and for several days before the fire he was actively engaged in making preparations to do so. He had already rented the premises to another, who was to have taken possession on Saturday, but in consequence of rain he was unable to do so. On Friday preceding the fire appellee made sale of such articles of property as he did not wish to take with him. On the evening of that day his family left the premises without any intention of returning, at least until after appellee's return from Nevada, where he subsequently went. Appellee remained on the premises Friday and Friday night, having retained with him a bed, bedding and some other articles of household goods of comparatively little value, his family in the meantime having stopped in the city waiting until he could perfect his

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arrangements for leaving. He also remained on the premises all the next day and until about nine o'clock of the night of that day, when he went into the city and spent the balance of the night—we presume with his family. On Sunday he returned to the premises and remained there till seven o'clock at night, when he again went back to the city and spent the night there, leaving his bed, bedding, etc., in the house, and that night, while he was in the city, it was, as before stated, destroyed by fire.

These are the simple, unvarnished facts as disclosed by the record. And the question now presented is, can this court upon this state of facts say, as matter of law, that within the meaning of the policy the premises in question were vacant and unoccupied at the time of the fire?

The condition in the policy rendering it inoperative in the event the premises should become vacant and unoccupied, was one that appellant had a right to exact, and when appellee accepted the policy with that provision in it, he became bound by it, and it is the duty of courts to enforce it like any other contract. Now, what is meant by the term "vacant or unoccupied," in the connection in which it occurs in the policy, is a question of law; but whether the house was, at the time of the fire, within the meaning of the policy, vacant and unoccupied, was a question of fact for the determination of the jury. In this particular case the jury found, as a matter of fact, that the premises were not, at the time of the fire, vacant and unoccupied. But as in all other cases, if the finding of the jury was manifestly against the evidence, it was the duty of the court to have set the verdict aside and granted a new trial.

This court has had occasion to determine, as a matter of law, what is meant by the term "vacant and unoccupied," in the condition of a policy of insurance like the one now under consideration.

In *American Insurance Co. v. Padfield*, 78 Ill. 167, it was said with reference to a similar condition. "A fair and reasonable construction of the language of vacant and unoccupied is, that it should be without an occupant—without any person living in it. * * * The language is not used in a technical, but popular sense." This, then, must be taken to be the meaning of the term, and it results that the real inquiry in this case is, whether appellee might, at the time of the fire, be regarded, within the meaning of

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the policy, still living in the house in question, for it is manifest his person was not in the house at the time.

It must be conceded also that the mere fact, that appellee had at the time of the fire a bed, bedding, and other articles in the house, would not, of itself, have protected him from the operation of the provision in question. And it is, moreover, equally certain that where the assured leaves the premises actually vacant — that is, without any occupant in them for an unreasonable length of time — the *animus revertendi* will not, however clearly it may appear, relieve him from the operation of such a condition in the policy. Now this case is not in some respects like the case last cited. There the premises covered by the policy were in the possession of a tenant at the time the insurance was effected, and the tenant had entirely left the premises for some two months before the fire, and the assured had been notified of this fact and had taken no steps to supply his place with another tenant. But the case was like the present in this, that there were some household goods and effects in the building insured during the time it was so vacated and at the time of the fire.

The object of courts, when enforcing a provision in a policy like this should be to endeavor to so construe it as to give effect to what might reasonably be supposed to have been the intention of the parties when they consented to it. It will hardly be contended that such a condition requires that the assured, or some of his family, should be actually in the house all the time. He may be living alone, or he may have only a wife. In such cases business, social and religious duties, would necessarily require the premises, in the literal sense of the term, to be often vacant and unoccupied. Suppose, in such case, the assured and his wife, being the only members of the family, go to spend a night with a neighbor to sit up with the sick, does his policy, having such a clause in it, become immediately suspended when he and his wife pass from under their own roof? And does the assured, while at the house of his neighbor, discharging a duty imposed alike by religion and humanity, cease to be an occupant within the meaning of the policy? Could it have been intended by the company or the assured that if a loss occurred under such circumstances the company would be relieved from all liability? We do not think so. And in such cases the liability could hardly be made to depend on the urgency or necessities that called the assured away.

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Suppose the assured and his wife, instead of going to sit up with the sick, go to attend a social gathering, would he lose the benefit of his policy if a fire should occur while there? We think not. Courts could hardly go into an inquiry as to the reasons which lead to a temporary absence, with a view of determining whether the operation of the policy was suspended during such absence. If, then, one having a policy of this kind may go to church, or spend a day or night with a neighbor, without ceasing to be an occupant of the premises, within the meaning of the policy, it follows that appellee going to town on Saturday or Sunday night would not, of itself, have had the effect of relieving appellant from the obligations imposed by the policy, for the mere fact that he intended to leave as soon as he could surrender the possession to his tenant would not have the effect of depriving him of such rights as other persons might, under a similar policy, exercise, who had no such intention of leaving. The circumstances under which appellee was placed are peculiar. He finds it necessary for him to change his residence. He well understands it will not do for him to start on his journey to Nevada leaving the premises unoccupied. He had paid the premium on his policy and he was entitled to its benefits.

He leases the premises for three years to another, who wants to take possession on Saturday, and it is arranged and intended that he shall do so.

Accordingly, on Friday evening, the assured removes most of his effects out of the house, and sends his family to the city, about a mile distant, to remain there till he can join them. He remains over, keeping a bed and bedding, and some other articles for his use while there, expecting the next morning to surrender the possession to his tenant; but next day brings with it a rain, which prevents the tenant from coming, and so of course the change of occupancy cannot be properly effected till Monday; yet the assured remains there on Saturday and Sunday, as he says himself, for the purpose of taking care of the property; but in the mean time the property is destroyed by fire.

All these facts show a manifest purpose on his part not to leave the premises till they were turned over to his tenant — otherwise he would have gone with his family at the start. And the fact that he spent Saturday and Sunday nights in the city did not have the effect to make the premises vacant and unoccupied in the sense of

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the policy. He and his whole family might have spent a night there without forfeiting his rights under it, provided they went with the intention of returning. Nor could the fact that his family did not intend to return make any difference, so long as he remained there himself. He was the head of the family. His domicile and home, in law, were theirs; and their rights, with respect to its occupancy and possession, must be regarded as subordinate to his.

Until he had finally left, it was immaterial where they were, so far as his rights under the policy were concerned. The facts simply show that appellee was making preparations to vacate and give the possession and occupancy to another. The thing was merely *in fieri*, not consummated.

We are therefore of opinion that the premises were not, within the meaning of the policy, vacant and unoccupied. This was really the only important or doubtful question in the case, if indeed it can be said to be doubtful. Nothing could be gained by a review of the authorities on this question. They are all in accord upon the proposition that to permit the insured premises to become vacant and unoccupied avoids the policy. But it is believed that no case can be found where premises have been held to be vacant and unoccupied under circumstances similar to those appearing in this case, and even if such case could be found we would not feel inclined to follow it. Such a provision in a policy must have a reasonable, practical construction, and not be made a mere snare to catch the unwary.

While some of the instructions for appellee are justly subject to criticism, yet we do not believe that the jury was misled by them. For if, under the facts, the premises were not vacant and unoccupied, as we hold they were not, then the judgment is right, whatever the instructions may have been.

We are of opinion that the judgment should be affirmed.

Judgment affirmed.

WALKER and SCHOLFIELD, JJ., dissenting.

CAIRO AND ST. LOUIS RAILROAD CO. V. PEOPLES.

(92 ILL. 97.)

Constitutional law — double damages — fencing railway

A statute making a railway company, neglecting to maintain proper fences along its tracks, liable in double damages for stock straying on the track and being killed, is constitutional. (See note, p. 115.)

ACTION to recover double the value of a cow killed by defendant's railway train. The opinion states the case. The plaintiff had judgment below.

Judd & Whitehouse, W. S. Searls and L. P. Butler, for appellant. The act of, 1874, Rev. Stat. p. 807, providing that railroad corporations shall be liable for "double the amount of damages," in case of injury to live stock which may get upon a railroad track by reason of a failure of the company to erect and maintain fences, as required, is in violation of that clause of the Constitution of 1870 which provides that "no person shall be deprived of life, liberty or property, without due process of law."

If this be a penal statute, the fine or penalty should be imposed for the benefit of the State, and not go to the individual injured.

The right of a plaintiff to recover punitive damages, or more than full compensation for an injury, has been gravely questioned. RYAN, C. J. in *Bass v. Chicago and North-western Ry. Co.*, 42 Wis. 672 ; s. c., 24 Am. Rep. 437.

Punitive damages are, in fact, given in consideration of some extreme hardship ; but a right to recover double damages authorizes the taking of a certain amount of the property of one person and giving it to another, after all actual damages have been satisfied, and when no other consideration could enter into the case than the actual damages suffered. A recovery of such damages, through the compulsory process of the courts, deprives a party of "property without due process of law."

The phrase, "due process of law," is equivalent to "the law of the land," and a statute, to be a law, must be one which the legislature had power to pass. *Sheppard v. Johnson*, 2 Humph. 285 ; *State v. Dougherty*, 60 Me. 509 ; *State v. Simmons*, 2 Spear, 767. These phrases are designed to exclude arbitrary power.

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In effect, the question resolves itself simply to this: whether the legislature, for any purpose, can force one man to compensate another twice, or twenty times, for an injury.

It may be stated as an established maxim in the policy of the State, that the legislative authority cannot reach the life, liberty or property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard for the public welfare. *Taylor v. Porter*, 4 Hill, 145; *Wilkinson v. Leland*, 2 Pet. 658. See, also, *Bay City and Saginaw Railroad Co. v. Austin*, 21 Mich. 401; *Lewis v. Webb*, 3 Greenl. 326; *Holden v. James*, 11 Mass. 396; 6 Am. Dec. 174; *James v. Reynolds*, 2 Tex. 251.

Allbright & White, for appellee.

SCOTT, J. This action was commenced under section 37, chapter 114, Rev. Stat. 1874, which provides that every railroad corporation that shall fail to erect and maintain suitable fences on either side of its road within six months after the same is open to use, sufficient to prevent stock from getting on the track, shall be "liable for double the amount of all damages" which may be done by its agents, engines or cars, to stock on such track.

[A minor point omitted.]

The point, however, relied on with the most confidence for a reversal of the judgment is, that the statute authorizing a recovery of double the amount of damages done to stock, where there has been a failure on the part of a railroad corporation to comply with the provisions of the act cited in regard to fences, is unconstitutional, and for that reason the judgment should be set aside.

Article 2, section 2, of the Constitution of 1870, provides, "no person shall be deprived of life, liberty or property, without due process of law;" and it is with that provision of the Constitution, it is said, the statute allowing the recovery of double damages in such cases is in conflict. The argument seems to be, if we fully comprehend it, that any statute that allows a party injured, in any case, to recover beyond the actual damages sustained, in some way deprives the wrong-doer of his property "without due process of law;" but how that conclusion is reached is not apparent. Statutes giving the owner the right to recover against an officer who sells under process of court property exempt from execution, in some

cases twice and others three times its value, have been enforced in this State through a long series of years, without any suggestion from any source that such statutes contravene any constitutional provision designed for the protection of the property of the citizen. That such statutes, as well as the one we are considering, are in their nature penal, may be admitted, but that is not their distinguishing feature. Such statutes are, no doubt, designed, in part, to punish the wrong-doer for negligent and willful omissions of duty, imposed by considerations of public concern; but most of all, the purpose is to furnish the party injured compensation for wrongs done to his person or property.

It is undeniable law, at least in this State, that in actions for personal injuries the party injured may recover beyond actual damages sustained, and where the facts and circumstances warrant the belief the injury was willfully inflicted, may recover exemplary or punitive damages. In such cases the damages recovered are both punitive and compensatory. So with the statute we are considering,—it is in its nature penal as well as compensatory. While the remedy given affords compensation to the party whose stock is injured or killed, it compels the observance by railroad corporations of those duties imposed by law for the security of the property of persons residing in the vicinity of their lines of road. The enforcement of such duties has always been regarded as within the police powers of the State, and may be invoked whenever the legislature deems it necessary to secure the public welfare. It is not perceived how the exercise of such powers contravenes any provision of our Constitution, or deprives one of his property “without due process of law.” With equal propriety it might be urged that the imposition of any penalty for wrongful conduct is inhibited by that provision of the Constitution,—a position that finds no sanction in reason or law.

That the compensation provided by statute in such cases as the one at bar, although partaking of the nature of penalty, may be recovered in the name of the party injured, has been uniformly allowed under analogous statutes by the practice in this State. In the recent case of *Cairo and St. Louis Railroad Co. v. Murray*, 82 Ill. 76, it was expressly ruled, in a case arising under this statute, that the action was properly brought in the name of the owner of the stock, and that it need not be in the name of the people.

The case of *Atchison and Nebraska Railroad Co. v. Baty*, 6 Neb. 37; s. c., 29 Am. Rep. 356, cited, cannot be regarded as a con-

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trolling authority. That case seems to regard "double damages" for stock killed or injured as purely a penalty,—a proposition to which we cannot fully yield our assent. Considering double damages as penalty, the conclusion reached by the court in the case cited was inevitable, as the Constitution of that State, as the opinion declares, provides, that "all fines and penalties * * * shall be appropriated exclusively to the use and support of common schools," and hence the decision that no private individual could recover the penalty. But we have no such constitutional provision in this State, and besides, the damages given by statute in such cases are not exclusively penalty, but are to be regarded as compensation as well as penalty, and may therefore be recovered in the name of the owner of the stock. Clearly, it is nothing more than a remedy given by statute for injury done to the property of the citizen, which it is understood, it is competent at all times for the legislature to provide.

The judgment is warranted by the law and the evidence, and must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — At the same term, in *Cairo & St. Louis Railroad Co. v. Warrington*, 92 Ill. 97, the same doctrine was held. WALKER, C. J., said:

"If the power to require railroad companies, as a police regulation, to fence their roads is constitutional — and we have seen it is — then it must follow that the general assembly is armed with ample power to adopt such means as will compel a compliance with the requirement. When such requirements are made of individuals they may unquestionably be enforced by penalties or forfeitures, and no valid reason is perceived why the same power may not be exerted to compel a compliance by corporate bodies. If the forfeiture of a sum equal to the value of the property destroyed is a penalty, there can be no question of the competency of the legislature to impose it for a failure to comply with the law. This forfeiture of a sum over and above the value of the property equal to that sum, although not called a penalty by the act, is, in all essential particulars, a penalty. It would have been no more so had it been so named.

"The policy of this law is apparent. It is to protect the public against injury incident to collisions between the trains and animals being on the track. To accomplish this the companies are required to fence their roads, and to compel obedience to the requirement the penalty is imposed for a non-compliance. It is true other means more stringent or lighter in their character might have been adopted, but the means was in the choice of the law-making power.

"As illustrative of the exercise of such power we may refer to some of the enactments by our general assembly. An action is given to any defendant in execution to recover double the value of property exempt from levy and sale on execution, when seized by an officer having such a writ. Also, to recover from a ferryman the money paid, and a penalty of five dollars, for charging more than legal tolls for ferrying the injured party. Also, a forfeiture of three dollars and all damages sustained by reason of a ferryman failing to perform his duty. The judgment and execution law gives an action to the debtor in execution against an officer in five times the actual damage sustained, for a fraudulent sale, or such a return of a sale by the officer making the same. The chapter entitled 'Mines' gives a penalty of \$500, in addition to the damages sustained, to the owner of mineral

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lands, by a trespass in removing his mineral. So of the chapter entitled 'Mortgages,' where the owner mortgages personal property, and afterward sells it without giving notice to the purchaser that it is mortgaged, an action is given to the purchaser to recover double the value of the property thus sold. A penalty of not less than \$10 nor more than \$100 is given, in addition to the damage done, for tearing down fences of railroads, for leaving gates or bars open at road crossings, or leaving horses, etc., standing at farm crossings. Also, treble damages, and a forfeiture of not less than \$25 nor more than \$1,000, by a railroad company refusing to transport passengers or property at the regular time and place. And penalties are given to the party aggrieved for a failure of a railroad company to furnish brakemen, or when the operation of brakes is not properly controlled by power from the engine. The chapter entitled 'Recorders' gives a penalty, and an action to recover damages of any person, for a violation of the provisions of section 28 of the act; and under the statute a sheriff is rendered liable to a forfeiture of a sum equal to five times the interest, for an unreasonable neglect to pay money collected by him, to be sued for and recovered by the person entitled thereto. A penalty of \$8 is given for each tree, against any person wrongfully cutting or destroying the same. The statute also gives double the amount of property taken or not given by false weights, and a penalty is also inflicted by the act.

"If these enactments do not establish the constitutionality of the law under consideration, they do show that the legislative and executive departments of the government have, since its foundation, supposed such legislation is not inhibited by the fundamental law. Those departments are under the same obligation to observe and conform to constitutional requirements as is the judicial branch of the government. And the validity of such laws not having been questioned for such a long series of years is no light consideration in passing on the validity of a law.

"We are referred to the case of *Atchison and Nebraska Railroad Co. v. Baty*, 6 Neb. 37; s. c., 29 Am. Rep. 586, which holds a similar enactment unconstitutional. Whilst we entertain a high respect for that court, we are unable to yield assent to the conclusion it has reached. In fact, we have no hesitation in holding that the law under consideration in no sense deprives appellant of its property without due process of law, any more than does a law which imposes a penalty or fine for the violation of any other police enactment. It is but a forfeiture exacted for the neglect of a duty imposed for the welfare and protection of community from wrong or injury. We cannot believe that the power of the general assembly is so limited as to be unable to afford this protection by such or even severer enactments, deemed necessary to enforce the duty. We must therefore hold this law constitutional."

 IRVIN V. NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILROAD CO.

(92 Ill. 103.)

Partnership — arrangement between connecting railway companies.

Several independant railway companies, whose lines connected, agreed each to carry over its own road the freight cars of the others, marked "Green Line," without breaking bulk, at certain rates, each fixing and collecting its own rates over its own road, and having no interest in other freights. In fixing its own rates, or through freight, each company would ascertain the rates charged by the other companies, and add them to the rates for its own line. These were called "Green Line rates." There was no joint expense or loss

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or profit, but if a loss could not be traced to any particular road, it was borne by all the carrying roads. *Held*, that this did not constitute a partnership, and the use of the words "Green Line" on bills of lading and a wharf-boat did not estop the companies.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Samuel P. Wheeler, for plaintiff in error, cited *Champion v. Bostwick*, 11 Wend. 571; 18 id. 175; *Fairchild v. Slocum*, 10 id. 329; *Nashua Lock Co. v. Worcester and Nashua Railroad Co.* 48 N. H. 339; s. c., 2 Am. Rep. 342.

Green & Gilbert, for defendant in error.

SHELDON, J. This was an action of replevin, by the Nashville, Chattanooga and St. Louis Railway Company, against Alex. H. Irvin, to recover possession of a wharf-boat, claimed by the former as its property, and which had been seized by the latter, as sheriff, under certain writs of attachment issued against "Green Line," as the property of "Green Line." The declaration contained the usual counts in *cepit* and *detinet*; and the pleas, whereon issue was joined, were *non cepit*, *non detinet*, property in defendant, property in "Green Line;" also a plea that defendant, as sheriff, took the wharf-boat as the property of "Green Line," by virtue of said writs of attachment, and that the same was the property of "Green Line," and subject to levy, etc.

The cause was tried by the court below without a jury, who found the issues for the plaintiff and gave judgment accordingly. The defendant brings the case here by writ of error, and asks a reversal of the judgment upon two grounds.

[Omitting the first.]

Second, that plaintiff suffered "Green Line" to have possession, and exercise control over the wharf-boat in such a way and to such an extent as to estop a denial of ownership in "Green Line."

It appears, from the record, that the cause of action upon which the writs of attachment in question issued against "Green Line," was loss of grain delivered to one W. T. Osburn, agent, Cairo, Illinois, in February, 1873, under and in pursuance of certain bills of lading by him executed, "to be transported from Cairo, Illinois, to the wharf-boat at Hickman, Ky., on board the good steamboat

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called Glasgow (the dangers of river, collision, explosion and fire excepted), thence by the N. & N. W., and N. C. railroads, and connecting railroads (subject to the conditions of their several freight regulations), to be delivered, etc.,"—to certain consignees named, at Columbus, Ga., and other points south—"he or they paying freight at the rate" in the bill of lading specified; which was a certain fixed sum per 100 lbs. At the top of the bills of lading was the heading "Green Line," and there also appeared the words "Through rates to," etc., there then following twenty-five enumerated places in different Southern States, some one of which was the place of destination named in the bills of lading.

At the time these bills of lading were executed by Osburn, the Nashville and Chattanooga Railroad Company (now Nashville, Chattanooga and St. Louis Railway Company, and plaintiff in this suit), owned and was operating its road, the Nashville and Chattanooga Railroad, from Chattanooga to Nashville; and the Nashville and Northwestern Railroad Company owned and was operating its road, the Nashville and North-western Railroad, from Nashville to Hickman, Ky., on the Mississippi river; and the steamboat Glasgow was engaged in transporting freights from Cairo to Hickman, for shipment *via* the Nashville and North-western road.

It does not clearly appear whether she was in the employ of the North-western Railroad Company, or ran independently. It does, however, appear that she was not in the employ of the Nashville and Chattanooga Railroad Company. The grain in question was lost about the 8th day of February, 1873, by the steamboat Glasgow, by the sinking of her barge *Eliza*, the boat never having reached Hickman. The proof is, that Osburn, who signed the bill of lading as agent, was the agent of the Nashville and North-western Railroad Company, employed and paid by that company, and that he never was agent for the Nashville and Chattanooga Railroad Company, and had no authority from that company. Prior to and at the time of the execution of the bills of lading and loss of the grain in question, the Nashville and Chattanooga Railroad Company had no agent at Cairo, nor had it done business there; and the wharf-boat in question, built and owned by that company, was then, and had been since its receipt from the builders in November, 1872, used by that company at Johnsonville, on the Tennessee river, and in the possession of one Capt. James F. Miller, as its agent. About a month after the loss of the grain in question, the Nashville and

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Chattanooga Railroad Company, on March 1, 1873, transferred its said wharf-boat from Johnsonville to Cairo. It was brought to Cairo in charge of Capt. Miller as agent of the Nashville and Chattanooga Railroad Company, who continued in its possession until its seizure under the attachments in question.

The Nashville and Chattanooga Railroad Company having purchased the Nashville and North-western railroad, on the 30th day of May, 1873, by the decree of the Chancery Court of Davidson county, Tenn., had its corporate name changed from Nashville and Chattanooga Railroad Company to the Nashville Chattanooga and St. Louis Railway Company. There is nothing showing any consolidation of the Nashville and North-western Railroad Company and Nashville and Chattanooga Railroad Company under the new name, nor any assumption of the debts or liabilities of the former company. Miller, after his arrival at Cairo, only did the business of the Nashville, Chattanooga and St. Louis Railway Company — he was its agent at Cairo and paid solely by it and none other. Miller issued no bills of lading until Osburn left. He then, as agent for and on behalf of the Nashville, Chattanooga and St. Louis Railway Company, commenced and continued to receive freights on board of that company's wharf-boat and execute bills of lading therefor, similar in form to those before issued by Osburn, up to and after the seizure of the wharf-boat under the attachments. After Miller came to Cairo, the words "Green Line" were painted on the roof of the wharf-boat ; but "Nashville, Chattanooga and St. Louis Railway" was also painted on the sides of the wharf-boat, like as the cars of the different roads have the name of the road they belong to on the end of the car, and "Green Line" on the sides.

As respects "Green Line," the testimony is that there is no such organization as Green Line ; that the words simply designate a route that the freights were to go without breaking bulk, at a through rate, over a good number of roads. There was an arrangement between different railroads, plaintiff being in the arrangement, whereby each road agreed to carry the cars of the other having the name "Green Line" painted thereon, over its own road without breakage of bulk, at such rates as might be agreed on, each company fixing its own rates of freight passing over its own road, and collecting the same as the freight passed over its road, and having no interest in freights not reaching its road. Each road desirous of

making a through rate over other roads *via* these "Green Line" cars, would ascertain the rates the intermediate road or roads charged, and adding the same to its own rates, fix its own schedule of through rates, which it termed "Green Line rates." It would then ship by these rates, executing its own bill of lading.

There appears, however, some confusion in the testimony as to fixing rates, there being evidence that there is a committee for making "Green Line rates," which met every month; but there is also distinct evidence that each road makes its own tariff to ship by "Green Line rates" to destination. There is no joint expense, each road hiring and paying its own agents, and operating its own road at its own expense; no joint property; no joint fund; no joint losses; no joint profits; no arrangement to share loss or profit,—each road on which any loss occurs pays it,—the only exception as to not sharing in loss being when a loss cannot be located on any particular road, then a *pro rata* share of the loss is borne by all that carry the freight. And there seems to be an agent for adjusting such loss,—the only case of there being any joint agent employed, excepting perhaps, a committee for fixing rates.

We are of opinion that the court below was justified, from the evidence, in finding that the arrangement among these railroad companies created no partnership or joint liability as between the roads themselves, or as to third persons. There was no community of interest, no community of profits and losses, but all was several. Story lays it down, that a communion of profit is of the very essence of the contract of partnership; "for without this communion of profit a partnership cannot, in the contemplation of law, exist." Story on Part., § 18.

Sometimes the arrangements of adjoining routes have been held to constitute a partnership, where they have put their earnings into a common fund and divided according to the length of their respective lines, and as in the case cited by defendant's counsel, of *Champion v. Bostwick*, 18 Wend. 175,—a case of an agreement for running a continuous line of stages. But it was there expressly said: "The case would be entirely different if each stage owner was to receive and retain the passage-money earned on his part of the line, and to sustain all the expenses thereof, and was only to act as agent of the others in receiving the passage-money for them for the transportation of passengers over their parts of the line. In that

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case there would be no joint interest, and no liability to third persons as partners."

In *Darling v. Boston and Worcester Railroad Corporation*, 11 Allen, 295, it was decided. If an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company so receiving them shall pay to its predecessor the amount already due for the carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and a payment by it of the charges of its predecessors, will not render it liable for an injury done to the goods before it received them; that such an arrangement created no partnership or joint liability; and that it would not, if further arranged that each line should charge only a stipulated rate of freight, so that any customer could be informed beforehand what the amount of freight would be to the place of destination.

So, also, in *Harlan v. Eastern Railroad Co.*, 114 Mass. 44, it was held, that an agreement between railroad corporations operating connecting lines as to the division of through ticket-money, and as to the sale of through tickets enabling passengers by the payment of a single fare to pass without change of cars from a point on one road to a point on the other, does not make the corporation selling a through ticket liable for an injury sustained by the purchaser upon the road of the other corporation,—that no community of interest, of obligation or of responsibility results from such agreement. This case, in the respect of liability from selling a through ticket, is apparently somewhat in conflict with *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332, where it was held, that a railroad corporation selling through tickets over its own and other roads is liable for the safe carriage of passengers and baggage to the place of destination. But a contract for such liability was there held to be implied from the mere sale of a through ticket; and the decision does not militate against the former case in the respect of the holding that a joint liability among the several roads did not result from such an express agreement as was there made.

The connection in business, here, of the several railroad companies was hardly beyond the extent of securing a continuous passage of freight over the different lines of road without breaking bulk, and as before remarked, we do not regard it as sufficient to

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create a partnership or joint liability. And see, also, *Merrick v. Gordon*, 20 N. Y. 93.

The second ground of alleged liability, that the plaintiff so acted with respect to the wharf-boat as to estop a claim of ownership therein, we regard as equally untenable. The chief ground for such claim of estoppel is the fact that the words "Green Line" were painted on the roof of the wharf-boat, and were printed at the top of the bills of lading; but there were also painted on the sides of the wharf-boat the words, "Nashville, Chattanooga and St. Louis Railway," so that as being indicative of ownership, it is not seen why the latter words would not neutralize the effect of the former. The words "Green Line" might denote that there was a running connection of some kind among the different roads, but would not indicate it to be of such a character as to amount to a partnership or create a joint responsibility. Any one in relying upon such an arrangement as the latter, would properly have been put upon inquiry in respect thereto, and any reasonable inquiry would have readily ascertained the connection that in fact existed. There is nothing in the case of any actual representations as to ownership or joint liability upon which to base defendant's claim.

The judgment of the court below will be affirmed.

Judgment affirmed.

CONTINENTAL INSURANCE COMPANY V. HULMAN.

(92 Ill. 145.)

Insurance — payable to mortgagees — subsequent insurance by one of mortgagors.

Husband and wife mortgaged the wife's premises, and got an insurance thereon payable to the mortgagee, as his interest might appear. The policy was conditioned to be void in case of subsequent insurance, whether valid or not, consent written on the policy. The wife alone procured another insurance in her own name. *Held*, (1) that the first insurance was of the mortgagors' and not of the mortgagees' interest; (2) that the first insurance was avoided by the second.*

* This decision accords with *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *State Mut. Ins. Co. v. Roberts*, 31 Penn. St. 438; *Russ v. Waldo Mut. Ins. Co.*, 53 Me 187. *Contra*, *Black v. National Ins. Co.*, 24 Low. Can. Jur. 65.

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ACTION on a fire policy. The opinion states the case. The plaintiff had judgment below.

Gilmore & White and *Melville W. Fuller*, for appellant.

Henry B. Kepley, for appellees. The insertion of the words "loss, if any, payable to Messrs. Hulman & Cox, of Terre Haute, Indiana, mortgagees, as interest may appear," in the policy, gave appellees, Hulman & Cox, the right to maintain suit upon the policy in their own names, and recover the full amount due by reason of any loss that occurred under said policy. May on Ins., §§ 378, 446, 447; *Mowry v. Todd*, 12 Mass. 281; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; *Ripley v. Aetna Fire Ins. Co.*, 29 Barb. 552; *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516; *Barret v. Union Mut. Ben. Life Ins. Co.*, 7 Cush. 175; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 id. 127; *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28; *Rogers v. Traders' Ins. Co.*, 6 Pai. 583; *Cone v. Niagara Ins. Co.*, 17 How. Pr. 444; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Hadly v. New Hampshire Fire Ins. Co.*, 55 N. H. 110; *Chamberlain v. New Hampshire Fire Ins. Co.*, id. 249; Sansum's Digest Law of Insurance, §§ 2, 5, 6, 7, 9, 13, 15.

There was not, in any proper sense, a double insurance in this case. There being two or more policies upon the same property does not necessarily render either void on account of other insurance without notice, or become in law double insurance. To have this effect the assured must be the same and the interest protected by both policies the same. That is double insurance where both policies cover the same insurable interest against the same risk. It is also a general rule that they must be in the name of the same assured. 2 Pars. on Cont. 459.

It is additional and valid insurance prior or subsequent, upon the same subject, risk and interest, effected by the same assured, or for his benefit, and with his knowledge or consent. Owners of different interests in the same property may respectively insure their interests without risk of violating a provision against other insurance. May on Insurance, § 365, and cases there cited; *Aetna Ins. Co. v. Tyler*, 12 Wend. 507; s. c. affirmed in 16 Wend. 387; *Sloat v. Royal Ins. Co.*, 49 Penn. St. 14; *Forbush v. West. Massachusetts Ins. Co.*, 4 Gray, 337; *Harris v. Ohio Ins. Co.*, 5 Ohio, 467; *Flanders on Fire Insurance*, 41.

The interests of the mortgagor and mortgagee are distinct, and each may be insured without one policy avoiding the other. May on Insurance, §§ 82, 83; *Fox v. Phoenix Fire Ins. Co.*, 52 Me. 333; *Traders' Ins. Co. v. Robert*, 9 Wend. 304; *Jackson v. Mass. Fire Ins. Co.*, 23 Pick. 418; 1 Bennet's Fire Ins. Cas. 764.

SHELDON, J. This was an action brought by Hulman & Cox against the Continental Insurance Company, to recover for the destruction by fire of a dwelling-house, upon which the defendant had issued a policy of insurance to Sarah Jane Ryan and John Ryan.

The facts appearing are, that on the 11th day of June, 1875, Sarah J. Ryan and John Ryan, her husband, executed and delivered to Hulman & Cox their mortgage upon a lot of ground at Watson, Illinois, upon which was the dwelling-house in question, to secure the payment of their note to Hulman & Cox, of the same date, for \$962.60, payable one year from date, with ten per cent per annum interest. On the following day, June 12, 1875, the policy of insurance sued upon was issued by the Continental Insurance Company upon the dwelling-house, for the sum of \$1,000, to run one year. It recites that the "Continental Insurance Company of the city of New York, in consideration of the receipt of \$6, do by this policy insure Sarah J. Ryan and John Ryan against loss or damage by fire, to the amount of \$1,000, upon their two-story frame dwelling-house, situated, etc. Loss, if any, payable to Messrs. Hulman & Cox, of Terre Haute, Indiana, mortgagees, as interest may appear."

Among the provisions contained in the policy are the following:

1. "If the assured shall have, or shall hereafter make, any other contract of insurance, whether valid or not, on the property hereby insured, or any part thereof, without the consent of the company written hereon, then, and in every such case, this policy shall become void."

10. "It is hereby mutually understood and agreed by and between this company and the assured, that this policy is made and accepted upon and with reference to the foregoing terms and conditions."

On the 29th day of May, 1876, the property insured was wholly destroyed by fire, the whole amount of the debt due from the Ryans to Hulman & Cox remaining unpaid, and being greater, including accrued interest, than the amount insured by the policy.

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John Ryan and Sarah J. Ryan both testified that at the date of the policy sued on, June 12, 1875, John Ryan held another policy of insurance in the Rockford Insurance Company on the house for \$1,500; that this policy was surrendered and cancelled June 25, 1875; that on August 11, 1875, Sarah J. Ryan applied for another policy of insurance from said Rockford Insurance Company, and a policy of insurance from that company was issued to her on the property covered by the policy sued on to the amount of \$1,200. It appeared that some time before the date of the mortgage John Ryan had conveyed the property embraced in the mortgage to his wife, Sarah J. Ryan. The preliminary proof of loss introduced in evidence, subscribed and sworn to by Sarah J. Ryan, also stated that in addition to the policy sued on, there was other insurance made on the property insured to the amount of \$1,200, as particularly specified in an accompanying schedule marked "A," wherein was set forth the policy of insurance issued by the Rockford Insurance Company to Sarah J. Ryan, for the term of five years, commencing August 11, 1875, and terminating August 11, 1880, it bearing date August 31, 1875, and being on this property in question, and for the amount of \$1,200. It was shown by the defendant that it had no knowledge of, and never consented to, this other insurance.

One of the defenses set up was, that the policy sued on had been made void by the other insurance in the Rockford Insurance Company. We are of opinion that this defense was maintained.

There was here another contract of insurance on the property insured, made by the assured with the Rockford Insurance Company without the consent of the defendant written on the policy in suit, and it was an express condition of the policy that in every such case the policy sued on should become void.

It is answered against this, that the interests of mortgagor and mortgagee are distinct, and each may be insured without one policy avoiding the other, as being other insurance, and that this was the case here—that in the policy issued by the Continental Insurance Company, Hulman & Cox were the insured, and that it was their interest as mortgagees which was insured; whereas, in the policy of insurance issued by the Rockford Insurance Company to John Ryan, and the one to Sarah J. Ryan, they, the latter, were the assured, and it was their interest as mortgagors that was insured. It is the written policy itself that must determine who were the as-

sured, and whose interest was insured. It is plainly Sarah J. Ryan and John Ryan whom the policy insures against loss or damage by fire, and it is their interest which it insures. The resort to parol evidence, if that were admissible, shows nothing different. The attorney of the plaintiffs in the taking of the mortgage, and the agent who made the insurance for the company, concur that the application was to insure the mortgagees' interest, and the agent declined to do so, but would only issue the policy to the Ryans, making the loss, if any, payable to the mortgagees. It is true that the policy was issued and delivered to such attorney, he representing to the agent of the company that the Ryans had authorized him to insure the property in their names, making the loss, if any, payable to Hulman & Cox, and the attorney paid the premium, Hulman & Cox furnishing the money; but he states the amount of the premium was charged to the Ryans and included in their note and mortgage.

Making the "loss, if any, payable to Hulman & Cox, mortgagees," was not an insurance of their mortgage interest in the property. As said in *Flanders on Fire Insurance*, p. 441: "It is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence it is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and of course none is recoverable by his assignee or appointee. In other words, a policy made 'payable to A in case of loss' is an agreement on the part of the insurers that 'A' shall recover whatever the person originally insured may be entitled to recover in case of loss; that is, it is a contingent order or assignment of what may become due under the contract, and not an absolute transfer by virtue of which the assignee acquires the full rights of an assignee of a chose in action." In *Franklin Savings Institution v. Central Mutual Fire Insurance Co.*, 119 Mass. 240, upon this subject, the court says: "The plaintiffs held a mortgage of the property, and on the day after the policy was issued, an indorsement was made upon it that it was to be payable, in case of loss or damage, to them 'as their mortgage claim may appear.' It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagees, but that they can claim only

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what the party originally insured is entitled to recover under his contract. *Fogg v. Middlesex Mut. Ins. Co.*, 10 Cush. 337; *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray, 169; *Loring v. Manufacturers' Ins. Co.*, 8 id. 28."

That the rights of the plaintiffs under the policy are subject to the conditions therein is quite clearly the case under the decisions of this court. In *Ill. Mut. Fire Ins. Co. v. Fix*, 53 Ill. 151; s. c., 5 Am. Rep. 38, after a very full and careful consideration of the subject, and in view of opposing decisions upon the point, this court said: "We deem it safer and more just to say that where a policy is assigned as collateral to a mortgage, though with the consent of the company, the assignee takes it subject to the conditions expressed upon its face, or necessarily inhering in it, and that no recovery can be had merely in consequence of the equities of the assignee if the assignor has lost the right to recover by violating the terms of the contract;" and to the like effect are *Ill. Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Home Mut. Fire Ins. Co. v. Hauslein*, 60 id. 521. In the latter case, where the assignment of the policy was made by the mortgagor to the mortgagee with the assent of the company, it was held that the assignee took the policy subject to the conditions it contained and that his equities conferred no right; that if the assignor had lost all right of recovery by violating the conditions of the policy, the assignee occupied the same position; and that the memorandum that the loss, if any, should be paid to the assignee as his interest might appear, did not change the rights of the assignee. Although the present is not the case of an assignment, but of a statement only in the policy, loss, if any, payable to the plaintiffs as their interest might appear, we consider the language and decisions above equally applicable here as in the case of an assignment of the policy.

The loss, which was made payable to the plaintiffs, was one which was payable under and by virtue of the policy, and in accordance with its terms and conditions, one of which was, that if the assured, who were John and Sarah J. Ryan, should have or make any other contract of insurance, whether valid or not, upon the property, then the policy should become void, and consequently no loss payable. There was such other insurance here—a violation by the assured of this condition—and no loss was recoverable under the policy, and no more so where the suit is in the names of Hulman & Cox, conceding that they have the right to sue, than if it

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were in the names of the Ryans. The import of the defendant's agreement was to pay to the plaintiffs any loss to which the Ryans might be entitled under their policy to the extent of plaintiffs' claim as mortgagees. But the Ryans were not entitled to any loss under the policy, and hence there was nothing payable to plaintiffs. [Omitting minor considerations.]

Judgment reversed.

CHICAGO AND ALTON RAILROAD COMPANY V. KELLAM.

(92 Ill. 245.)

Negligence — railway — cattle crossing track.

Where cattle have escaped from an owner's inclosure and are crossing a railway at a highway crossing, and the engine-driver sees them, but does not stop nor slacken speed, but runs upon and kills one of them, this is gross negligence for which the railway company is liable.

ACTION for killing of a cow. The opinion states the case. The plaintiff had judgment below.

Warren & Pogue, for appellant.

J. H. Yager, for appellee.

SCOTT, J. This suit was brought by Edgar P. Kellam against the Chicago and Alton Railroad Company, to recover the value of a cow killed on defendant's road. As the cow was killed on a public road crossing, it is not claimed defendant is liable for the loss sustained unless the killing was negligently or willfully done. There is no pretense it was willfully done, so the case is narrowed to the single issue whether the servants of defendant in charge were guilty of negligence in the management of the train that did the injury.

It is insisted this case is controlled by the cases in this court, that declare an engine-driver is not bound to stop his train or even slacken the speed when stock is discovered quietly grazing near the track, or to stop his train on every slight apprehension of danger. *Peoria, Pekin and Jacksonville Railroad Co. v. Champ*, 75 Ill. 577;

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Chicago, Burlington and Quincy Railroad Co. v. Bradfield, 63 id. 220. But the facts in the case at bar are so unlike the facts in the cases cited, the principle declared can have no application. In both cases cited the animals killed were seen grazing near the railroad on the commons, and they were not seen approaching the track until it was too late to stop the train in time to avoid the danger. It was very properly held, it could not be anticipated the animals would suddenly come upon the track, and for that reason the law had not imposed the obligation to slacken the speed of the train. In such cases it was thought neither the safety of the citizen nor the protection of property required the adoption of any such regulation.

But that is not the case here. The animal killed was not feeding on any commons. The herd with which it had been pastured escaped from the inclosure without any fault on the part of the owner, so far as this record discloses, and was next seen on the highway. Exactly what number composed the herd was either not known or was not accurately stated, as the witnesses differ materially as to the number. At all events the number was great enough to attract attention. Parties residing in the vicinity of the crossing where the cow was killed, and who saw the killing, all concur in saying the cattle were travelling in a line across the railroad track on the public road, and all the herd had passed over except the cow belonging to plaintiff, as the express train was seen approaching from the north. She was a heavy animal, and moved, it is said, rather slower than the others composing the herd. Whether she stopped west of the crossing after the other cattle had gone over, and was standing still when first discovered by the engine-driver, the evidence is conflicting. There is testimony, and it is the most reasonable account given, that she was following slowly after the others and had not stopped at all. There is not a particle of evidence that she was "quietly grazing" near the track, or that there was any thing to graze upon in the highway.

Assuming it to be true, as we must do from the finding of the jury, that the herd, including plaintiff's cow, was moving in a line across the railroad track, following closely one after another, it was the plain duty of the engine-driver to have slackened the speed of the train that he might be able to avoid destruction of property; and the only question that can arise in the case is, whether the omission to perform that duty can be attributed to defendant as negligence.

There was certainly nothing to obstruct the view, and it is no doubt true the engine-driver saw the cattle following each other in a line as they passed over the highway crossing of the track, and he ought, at least, to have slackened the speed of the train so as to have given him the control of it when it became apparent the herd might not all get over before his train would reach the crossing. A part of the herd had passed over the track, and it would be the most natural conclusion the others would follow immediately rather than go in another direction when alarmed by the sound of the whistle. It seems to us no one could reasonably anticipate any thing else. It was an unusual thing to see cattle on the highway at that hour of the morning without a herdsman, and that fact itself ought to have arrested the attention of the engine-driver and enjoined upon him a high degree of care. It was unlike the discovery of stock grazing quietly on the commons near the track, and under the circumstances it was negligence of a high degree not to slacken the speed of the train. It was running at the rate of thirty miles an hour. The result that followed ought to have been anticipated, and it seems little less than recklessness in the engine-driver not to heed the danger that was so imminent.

[Omitting minor matters.]

Judgment affirmed.

RYHINER V. FEICKERT.

(92 Ill. 306.)

Negotiable instruments — joint payees — partnership — evidence — presumptions.

A note was executed and delivered, payable to the order of "Chas. & Wm. Feickert." They were not in fact partners. Charles Feickert, being in possession of the note, and authorized to collect it, representing that the plaintiffs were partners, sold and assigned it to the plaintiff by a writing signed by him in the style of "Chas. & Wm. Feickert." *Held*, (1) that the note was not *prima facie* payable to a firm; (2) that Charles Feickert's possession was no evidence of a partnership; (3) that title as against both could only pass by a joint indorsement; (4) that the authority to collect did not authorize the sale.

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ACTION on promissory notes payable to "Chas. and Wm. Feickert." Charles Feickert, representing that he and William Feickert were partners, under the name of Chas. & Wm. Feickert, and that he was authorized to sell and assign the notes, and receive the money, sold said notes to appellants, F. Ryhiner and others, for full value, and indorsed and assigned the same in the following words :

"We assign the within note over to Messrs. F. Ryhiner & Co.,
without recourse on us. CHAS. & WM. FEICKERT."

The purchasers had no notice of any title to the same in appellee outside of what appeared upon the face of the notes. Since appellants purchased the notes they have collected from the maker thereof the sum of \$180. The notes were secured by a deed of trust, and were given for the purchase-money of a farm owned by Charles Feickert and William Feickert, and were left in possession of Charles Feickert for convenience to the maker in making payment. Charles and William Feickert were never in partnership. William never transferred the notes or deeds of trust, nor authorized Charles Feickert to do so — and had no notice of the assignment until some two years after. He always protested against the validity of the assignment, and insisted on his right to one-half of the notes. Charles Feickert tended the farm, collected the rents, and attended to the business pertaining to it, until they sold the farm. They carried on the farm together for about four years. Charles Feickert had authority to collect the notes when due, and they were left with him for that purpose. Charles Feickert was insolvent. The indorsements on the notes were all in the handwriting of Charles Feickert. Suit was brought by appellee to recover one-half of the \$180 paid to appellants on the notes, and the plaintiff had judgment below.

G. B. Burnett, for appellants.

Metcalf & Bradshaw and *Fritz E. Scheel*, for appellee.

SCHOLFIELD, J. That a partner may, in general, indorse and transfer a promissory note made payable to his firm is not questioned. It is also unquestioned law, that if a note be made payable or indorsed to several persons not partners, the transfer can only be

by a joint indorsement of all of them. Story on Prom. Notes, § 125; Chitty on Bills and Notes (8th Am. ed.), 52; 2 Pars. on Bills and Notes, 4-5; 1 Dan. on Neg. Insts., § 684. Says the author last referred to: "If several persons not partners are payees or indorsees of a bill or note, it must be indorsed by all of them. Either one of the joint payees may authorize the other to indorse for him, and an assignment of this interest in the paper from one to the other carries with it such authority. But there is no presumption of law that one may indorse for the other." *Ubi supra*.

The question whether there was in fact a partnership between appellee and his co-payee, Charles Feickert, is conclusively settled in the negative by the finding of the appellate court. Laws 1877, p. 153, § 89.

The contention of the appellants, however, is that appellee, by his conduct, induced appellants to believe that appellee and Charles Feickert were partners, and to deal with Charles Feickert under the belief that they were a firm.

The facts upon which this is predicated are: 1st. The names of the payees of the notes are abbreviated and written as "Chas. & Wm. Feickert," instead of in full, "Charles Feickert and William Feickert;" and 2d, Charles Feickert had possession of the notes.

We cannot say, as matter of law, that the mere use of the abbreviated form, instead of writing the name of each of the payees in full, authorized the public to assume they were partners. A firm name might certainly be thus expressed. But the abbreviation does not necessarily convey the idea that the names are those of a firm. There are no words expressive of the idea of partnership, company or association superadded. Such abbreviations as this are frequent in conversation and in writing to avoid the unnecessary repetition of the surname, and may obviously be used with quite as much propriety where the design is to express a joint interest merely, as where the design is to express a partnership.

The possession of the note by Charles Feickert, under the circumstances, is of no significance. In all cases where notes are payable to joint payees instead of partners, the actual manual possession of the notes must be in some one of the payees. It is impossible that it can be in all at the same time. The faces of these notes disclose the interest of the holder—that he is joint payee, and that therefore he holds for himself and for all the other

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payees — and rebut any presumption that might arise otherwise from the mere possession of the notes.

Where notes are payable to “bearer,” or to “order,” possession is *prima facie* evidence of legal ownership. 2 Pars. on Notes and Bills, 42. And possession of a note, not indorsed, by one other than the payee, affords *prima facie* evidence that he is the equitable owner. But possession by one shown on the face of the note to be but a joint payee, could be regarded only as *prima facie* evidence of the title there disclosed. Illustrations of this may be found in the rule applicable to the possession of property by co-tenants. Freeman on Co-tenancy, § 167; *Brown v. Graham*, 24 Ill. 628.

The further point is made by the counsel for appellants, that conceding that Charles Feickert could not, by his indorsement of the notes, transfer the title of appellee, yet appellants' title to the notes and their right to collect and appropriate the money due thereon exists just as effectually by the delivery of the notes for a valuable consideration paid as if the notes had been assigned to them.

The principle upon which it is held that the indorsement of one partner binds all the members of the firm is that of agency — that each partner, within the scope of the partnership business, is the agent of all the others; but this has no application to mere joint payees, and hence one cannot bind the other by his indorsement. Story on Agency, § 39. Neither party being the agent, in legal contemplation, of the other, he can no more bind the other by a sale of the note, without indorsement, than he can by a sale of the note with an indorsement. He has no power whatever to dispose of the interest of his co-payee, either legal or equitable, in the note, without the consent of his co-payee.

Nor do we conceive the fact that Charles Feickert was authorized to collect the notes when due as of any controlling significance. This only authorized him to collect when due, not to sell or compound the notes. *Thompson v. Elliott*, 73 Ill. 221; *Padfield v. Green*, 85 id. 529.

We see no cause to disturb the judgment of the appellate court, and it is affirmed.

Judgment affirmed.

AMERICAN INSURANCE COMPANY V. FOSTER.

(92 Ill. 334.)

Insurance — school-house — leaving vacant and unoccupied.

An insurance policy was issued on premises described as a school-house. There was the usual condition against vacancy. The school was discontinued, and the building was subsequently occupied as a dwelling, until April, and was then vacant until the 14th of October, when it was burned, while unoccupied. It was held that the insurance was forfeited.*

ACTION on a fire policy. The opinion states the facts. The plaintiff had judgment below.

J. M. Bailey, for appellant.

John J. Brenholt, for appellee.

WALKER, J. It appears that on the 21st day of November, 1871, appellant issued a policy of insurance against loss or damage by fire and lightning, to the amount of \$265, for a period of five years from its date — on appellee's school-house, for \$225, and on school furniture therein, \$40. The house was destroyed by fire on the 14th day of October, 1876, and this suit is brought to recover the insurance on the building.

The case was submitted to the court below and tried without a jury, by consent of the parties, upon an agreed state of facts. The court held the company liable, and rendered judgment against it for \$225 and costs. To reverse that decision the company appeals, and brings the record to this court, and assigns the rendition of the judgment as error.

The defense urged by the company was, that appellee had violated an express condition of the policy by permitting the building to remain vacant and unoccupied for several months prior to the loss, and it was so vacant at the time of the loss.

The material facts agreed to be true, and upon which the correctness of the judgment depends, are, that the condition claimed to have been violated is this :

* Compare *Whitney v. Black River Ins. Co.* (72 N. Y. 117), 28 Am. Rep. 116.

“If the above-mentioned premises, or any portion thereof, shall become vacant and unoccupied without the assent of the secretary of the company indorsed hereon, then and in such case this policy shall be void, and the assured shall not be entitled to recover from the company any loss or damage which may accrue in or to the property hereby insured, or any part or portion thereof.”

The language of the stipulation relating to the occupancy of the premises is as follows :

“That the house when insured was occupied and used as a school-house ; that after April, 1875, no school was held in said building, and the school furniture was removed, and the building was then rented and used as a dwelling-house. That said building was last occupied as a dwelling in April, 1876, and from then until destroyed by fire the house remained vacant and unoccupied.”

It was further stipulated: “That the assent of the secretary of the company is not indorsed on the policy sued on, as required under the above condition of the policy.”

These policies are contracts between the parties, and in them they may insert any and all conditions and stipulations they choose, unless prohibited by statute or considerations of public policy. There is no statute prohibiting the insertion of such a condition into a contract of insurance, nor do we perceive any reason, nor has any been suggested, why such a condition contravenes public policy. The parties being able to contract, and such an agreement not being illegal, the parties must be bound by it as they have made it.

In this condition there is nothing ambiguous, but on the contrary, the agreement is plain, and would be read and understood alike by all persons. Every person reading it would understand that if the house became and remained vacant and unoccupied without the consent of the secretary of the company, the policy would become void, and the owner could not recover for loss that might be sustained when thus vacant. All would so understand it, because it says so in language that could not be made plainer. This language cannot be construed to mean the building might be vacant for months. It might be perverted from the plain meaning of the words and the grammatical sense in which they are used, but they will not bear such a construction. If the building had been vacant after the policy was issued, and was again occupied previous to the loss, a different question might have been presented, but that question is not before us, and is not, therefore, discussed.

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It is however contended, that as the building was insured as a school-house, and the company knew it was to be so used, it may be inferred that it was intended to be vacant and unoccupied as common public school-houses usually are in vacation; that all know that the common school-houses of the country are not continuously occupied, and it must be inferred that occupancy of that character was intended.

If such had been the intention of the parties they would, no doubt, have so written the condition. And the bare reading of the language repels such an inference. The language requires a continuous uninterrupted occupancy, at least of the character usual to houses occupied for schools. It may be, and probably is true, that there being no person in the building of nights and Saturdays and Sundays would not amount to a breach of the condition and avoid the policy, as such is the usual manner of occupying school-houses. But the most strained construction cannot go beyond that, so as to hold that it need not be occupied as a school or as a residence for several months. To so hold would be a perversion of the language the parties have employed to express their meaning.

The breach of the condition is clear and stands admitted. It avoided the policy, and precluded the assured, in terms, from a recovery, and the court below erred in rendering judgment for the amount of the policy on the building. The breach of the condition precluded all recovery, and the judgment of the court below must be reversed.

Judgment reversed.

FUNK V. EGGLESTON.

(92 Ill. 515.)

Will—devise—execution of power.

A husband devised to his wife, for her life, two-thirds of his entire estate, subject to certain specific legacies, with power to dispose of the same absolutely by will or deed. After his death, the wife acquired the fee of the undivided third of the lands so devised to her. Subsequently she executed a will, making some specific bequests, and then providing as follows: "All and singular the rest, residue and remainder of my estate, real and personal, of whatever kind and wheresoever situate, I hereby order and direct to be converted into money by my executors." "And for that purpose I do author-

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ize and empower them to bargain, sell, and convey my real estate wherever situate, and to make, execute, acknowledge and perfect all deeds and conveyances in law necessary to assure in the purchaser or purchasers thereof the full title thereto, the said real estate to be sold as soon as the same can be done without sacrifice, in the discretion of said executors." "And when my said residuary estate shall be converted into money as aforesaid," etc., with directions for its distribution. She also bequeathed a gold watch and some household furniture, which came to her under her husband's will, to different persons. She died seized of several parcels of real estate. *Held*, that the power of disposition conferred by her husband's will was fully exercised, and her will carried all the property in which she derived any interest under that will.

EJECTMENT by heirs of Absalom Funk, for lands owned by him in his life-time. He left a will providing among other things as follows :

"2. It is my will and desire that the remaining two-thirds of my real and personal estate, after the payment of my debts and the payment of the legacy hereinafter named, shall go to and become the property of my beloved wife during her life, with full power and authority for her to dispose of the same as she may think proper, by will or otherwise, before her death. Therefore, I give and bequeath to my said wife, Sarah Funk, said two-thirds of my estate, subject to legacies as follows : I desire that she shall give of said estate at least \$500 apiece to each of her three daughters, Harriet, Sarah and Julia Ann, whenever she shall think proper so to do. Also, to give to her granddaughter, Mary Ann Clarkson Funk, the sum of \$2,000 in property and money for her education and for her support ; and all the rest of the said two-thirds of my said estate, so given to my said wife during her life-time, may be disposed of as she may think proper, but I do request if said Mary Ann Clarkson Funk shall be living at the time, may have the whole of my estate which my said wife may not have disposed of ; and should she not do so, it is my wish at her death that her said granddaughter may have the whole of my estate undisposed, to her and her heirs forever. But, if my said wife shall survive her said granddaughter, then at her death I desire my brothers and sisters and their descendants shall have whatever remains of my estate not disposed by my said wife, in equal parts thereof.

"The \$500 each and the \$2,000 legacies, above named, are to be paid over to said legatees at all events as their respective estate, out of my wife's two-thirds above named.

"I hereby nominate and appoint my beloved wife, Sarah Funk, my executrix of this, my last will and testament, and request that she shall not be required to give security for administration thereof, but may give her own bond therefor."

Said Funk died in 1851. Sarah Funk, his widow, died in 1866, and left a will giving a number of specific bequests, including her gold watch and all her household goods, and then providing as follows:

"14th. All and singular the rest, residue and remainder of my estate, real and personal, of whatever kind and wheresoever situate, I hereby order and direct to be converted into money by my executors hereinafter named, and for that purpose I do authorize and empower them to bargain, sell and convey my real estate wherever situate, and to make, execute, acknowledge and perfect all deeds and conveyances in law necessary to assure in the purchaser or purchasers thereof the full title thereto, the said real estate to be sold as soon as the same can be done without sacrifice, in the discretion of said executors.

"And when my said residuary estate shall be converted into money as aforesaid, I do hereby will, order and direct the same shall be divided by my executors hereinafter named into three equal parts and shares, and disposed of as follows, that is to say:

"1. One full equal third part and share whereof I give, devise and bequeath unto my said daughter Sarah Roche, to have and to hold to her and to her sole and separate use and to her heirs and assigns forever.

"2. One other full equal third part and share of said residuary estate I give, devise and bequeath unto my said daughter Harriet Albee, to have and to hold to her and to her sole and separate use and to her heirs and assigns forever.

"3. The remaining one full equal third part and share of my residuary estate I give, devise and bequeath unto my said executors hereinafter named, in trust for my grandchildren, viz.: George E. Lopp, John Lopp and Sarah E. Davis (who are the children of my deceased daughter, Julia Lopp), in equal parts, share and share alike, to be paid to them, respectively, with all accumulations of interest thereon, when they shall severally attain the age of twenty-one years, to have and to hold unto them, the said George E. Lopp, John Lopp and Sarah E. Davis, to their sole and separate use and to their heirs and assigns forever, respectively; but should my ex-

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ecutors, in their discretion, deem it necessary so to do, they may advance any part of the interest accumulated on any share of said grandchild, toward the education and maintenance of said grandchild to whom such share belongs, during his or her minority."

She died possessed of considerable money and other personalty, and seized in fee of several parcels of real estate. The watch and household goods bequeathed by her came to her under the said provisions of her husband's will. Other facts appear in the opinion of the court. The defendants had judgment below.

Williams, Burr & Capen, for appellants. 1. A power of sale or other disposition attached to a life estate will not enlarge it into a fee. *Fairman v. Beal*, 14 Ill. 244; *Boyd v. Strahan*, 36 id. 355; 4 Kent's Com. 319-336; 6 Greenl.'s Cruise on Real Prop. 256 (or ed. 1849, vol. 3, 316); 1 Hill. on Real Prop. 622; *Dean v. Nunnally*, 36 Miss. 358; *Andrews v. Brumfield*, 32 id. 107, 115; *Rail v. Dotson*, 14 S. & M. 176, 184; *Jackson v. Robbins*, 16 Johns. 537, 587; *Barford v. Street*, 16 Ves. 135; *Reith v. Seymour*, 4 Russ. 263; *Smith v. Bell*, 6 Pet. 68; *Collins v. Carlisle*, 7 B. Monr. 13; *Carroll v. Carroll*, 12 id. 637; *Edmondson v. Dyson*, 2 Kelly, 307; 1 Sugden on Powers, 120.

2. If legacies are made a personal charge on the devisee, an acceptance of the devise makes such legacies a personal charge on the devisee, and he will take the estate devised as a purchaser. But if the legacies are chargeable on the estate devised the devisee does not take as a purchaser, but as a beneficial devisee. 1 Hill. on Real Prop. (3d ed.) 630, § 43, and cases there cited.

3. Sarah Funk, by the will of her husband, Absalom Funk, took a life estate with power of disposition by deed or will. It only remains to inquire, does the will of Sarah Funk execute the power vested in her by the will of her husband?

4. A will is not an execution of a power by the testator, unless, 1st, the will describes the property on which the power rests; or, 2d, refers to the power; or, 3d, would be inoperative without acting on the property over which the testator had the power. 4 Kent's Com. 334, and note to 335 and cases cited; 1 Jarm. on Wills, side page 628; 2 Hill. on Real Prop. (3d ed.) 597, § 47; 2 Greenl.'s Cruise Real Prop., side page 198; 2 Washb. on Real Prop. 319, 612; *Nowell v. Roake*, 6 Bing. 475; *Caldecott v. Johnson*, 7 M. & G. 1047; *Mory, Ex'r, v. Michael*, 18 Md. 227; note 5, to *Blake v.*

Bunbury, 1 Ves. 194 ; note 3, to *Bull v. Nordy*, id. 272; *Smith v. Bell*, 6 Pet. 68; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Bradley v. Westcott*, 13 Ves. 445; *Roach v. Haynes*, 8 id. 584; *Lovell v. Knight*, 3 Sim. 275 ; *Lempriere v. Valpy*, 5 id. 107; *Blagge v. Miles*. 1 Story, 426; *Coffing v. Taylor*, 16 Ill. 452, 474.

Tuley, Stiles & Lewis and *William Hopkins*, for appellees.

BAKER, J. [Omitting minor questions.] The important question, however, in this record, is whether the general devise in the will of Sarah Funk was a good appointment under the power donated by the prior will of Absalom Funk.

Sir Edward Sugden, in his work on Powers, after reviewing the cases in which was involved the matter of the execution of a power by the donee, remarks : " It is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property. The mischief has been increased by the courts, in some recent instances, adopting a strict construction, with a view to establish a certain rule. The particular disposition, when the power or the subject is not clearly referred to, must always raise a question of construction. Now, without breaking in upon the general rule, but, on the contrary, giving to it its full force, the intention in many of the decided cases might have been effectuated."

In *Jones v. Tucker*, 2 Mer. 533, Sir WILLIAM GRANT, in announcing the decision of the court, said : " In my own private opinion, I think the intention was to give the £100 which the testatrix had power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

In *Nannock v. Horton*, 7 Ves., Jr., 398, Lord Chancellor ELDON said : " I am not sure the rule does not oblige the court to act against what probably might have been the intention nine times in ten."

In *Davies v. Thorne*, 2 DeGex & Sm. 347, Sir J. L. KNIGHT BRUCE, vice chancellor, remarked, in giving judgment : " I must, although almost ashamed to say it, decide against what I firmly and sincerely believe to have been the intention of the testatrix, that the power of appointment has not been exercised. I am bound, however, by the authorities. I cannot help myself, and I must so decide."

Criticisms upon this particular branch of the law equally severe,

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and emanating from judges and jurists of equal eminence, might be greatly multiplied ; but they have, perhaps, no effect, unless it be to impress upon the mind that some rule has been pressed beyond its legitimate domain by at least some of the adjudicated cases.

The fundamental principle deducible from all the cases, from *Sir Edward Clere's* case, in 6 Coke, 17 down, is that there should be a certain ascertainment of the intention of the donee of the power to act under the power. Three classes of cases arose in which it was demonstrated to an absolute moral certainty there was an intention to execute the power, and these were where there was a reference to the power, or to the subject or property covered by the power, or where the instrument would be inoperative without the aid of the power. The cases ranging themselves in one or another of these three classes, it was judicially announced in some of the cases that there could be no execution of a power by testator, unless the case fell in one of these three classes. This has been questioned by some judges, but the weight at least of English authority is that way. At all events, the rule which requires the existence of one of these three elements, in order to effect an execution of the power, is altogether subordinate and secondary in its character, and if circumstances could and should arise that indicated clearly the intention of the donee to work by the power, it could not be but that the artificial rule, predicated upon former experience, must give way, and the primary and fundamental rule, which requires only that the intention be made clear and manifest, would prevail.

It is evident the one rule is based upon principle, and is substantial, while the other is artificial and based upon past experiences, and it is at least within the range of possibility that future experience may develop exigencies that the past has not, and demand a recurrence to the fundamental rule. Not only so, but we are strongly impressed that these exigencies, which are possible in the future, have to some considerable extent occurred in the past, and have afforded occasions for criticisms such as we have quoted, and for nice and subtle distinctions, and for refined reasoning, in order to effectuate the intention of the donee of the power, and at the same time on some theory, plausible if not substantial, bring the case within one or another of the three classes referred to.

In *Madison v. Andrews*, 1 Ves., Sr., 58, the deed reserved a power to charge, limit or appoint, and in the will the word

“charge” was used, and Lord HARDWICKE considered the use of a term in the power as a reference to the power. The testator, by his will, charged all his real and personal estate with his debts and legacies, and it does seem to us that to refer the words “my estate” to the property under the power, is going beyond even a liberal construction of the rule said to be deduced from *Clere’s* case, and that the turn made upon the word “charge” is hardly substantial. So, also, the same eminent judge in *Churchill v. Dibbin*, cited by Sugden, held both the freeholds and the leaseholds covered by the power to pass by the residuary gift, and this, notwithstanding the fact the testatrix had purchased other leaseholds with her savings, which other leaseholds were also held to pass. It would seem difficult to harmonize this decision with the illiberal rule contended for. It would be equally difficult to bring *Walker v. Mackie*, 4 Russ. 77, within such rule.

In the celebrated case of *Standen v. Standen*, 2 Ves. Jr. 589, which was afterward affirmed in the House of Lords, the gift was generally of the residue of the testatrix’s real and personal estate. The gift was held valid as to the real estate, because she had no real estate of her own; but this did not apply to the personal estate within the power, and it was equally held to pass. The ground of this decision was, that the fact of the testatrix not having real estate gave to her disposition the character of an execution of the power over the real estate; it showed her intention to execute her power, and that when she talked of her real estate, she meant the real estate in the power; and the same intention was held to govern the entire gift. And yet, the power was not referred to in this will, the personal estate under the power was not in any manner specified, and it does not appear but that the testatrix had other personal estate out of the power. It is going a long way to say that, where the extrinsic evidence introduced the fact that she was dealing with real estate in the power, that fact supplied, as to the personal property under the power, one of the three elements supposed to be necessary to work its transfer.

We might readily multiply instances where the reasoning of the courts has been equally far-fetched in order to bring cases, where the real intent of the testator was clear and manifest, within the pale of the secondary and technical rule spoken of above. And such cases indicate the straits to which judges have been driven to

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effectuate that which they were satisfied was the real intention of the testator. In the vast diversity of human affairs and conduct it is useless, vain and unsound to attempt to limit the modes by which human intention may be manifested.

It is the established doctrine, in the interpretation of wills, the intention is the polestar to direct the court. In *Boyd v. Strahan*, 36 Ill. 358, this court said: "The familiar rule which controls all others in the interpretation of wills, is, that the intention of the testator to be gathered from the entire will must govern. There is no other class of instruments known to the law in which so little importance is to be attached to the technical sense of language, in comparison with that sense in which the apparent object of the writer indicates his words to have been used." It seems anomalous, then, that in the interpretation of a will the court should require a degree of proof that amounts to an absolute moral demonstration of the intention of the testator, before it will regard his wishes; that even that degree of proof, which will justify a conviction for a capital crime, will be insufficient.

In *Scrope's case*, 10 Co. 144, Lord COKE says, "*Quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.*" And Chief Justice BEST says, in *Nowell v. Roake*, *infra*, "The rule given by Lord COKE is larger than that which has been deduced from the decision in *Clere's case*. Lord COKE's rule will be complied with, if the intention to execute a power be unequivocally manifested by any circumstances occurring in the case, or any act of the owner of the power, without requiring any specified overt acts of such intention."

In the case of *Blagge v. Miles*, 1 Story, 427, Mr. Justice STORY, of the Supreme Court of the United States, speaking in regard to the execution of powers by last wills and testaments, says: "The main point is to arrive at the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful,

under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it should appear by words, acts or deeds demonstrating the intention."

We find no case so like the one before us in its circumstances as *Nowell v. Roake*, first decided by Lord Chief Justice BEST, in the Court of Common Pleas, 2 Bing. 503, afterward reversed in the King's Bench, 5 B. & C. 730, and the judgment of the King's Bench affirmed in the House of Lords, 6 Bing. 475. We are not constrained by the decisions in this case as binding authority, as they were not rendered until a period long subsequent to our Revolution.

For the purposes of condensation we quote from 1 Sugden on Powers, side page 383, his statement of the point decided, and of the case: "Although the testator has the entirety of an estate, yet if any share of it is vested in him only for life, with a power of appointment, a general devise of all his estates will only pass the share of which he is seized in fee, and a direction which might properly be applied to the entirety will not be construed to enlarge the gift. This was decided in *Nowell v. Roake* when one moiety of an estate was settled by the testatrix to her husband for life, remainder to herself for life, remainder to such uses as she should appoint by deed or will, and for want of such appointment to the children of the marriage, with remainders over, and the testatrix afterward bought the other moiety, which was conveyed to her in fee, and she had no other real estate, it was held in the Court of Common Pleas that a devise by her of all her freehold estates to one for life, on condition that out of the rents thereof he should, from time to time, keep such estates in proper and tenantable repair, with remainders over, passed the entirety of the estate, that is, operated at once as an execution of her power over one moiety, and a devise of her interest in the other. The court relied upon the general intention, and laid some stress upon the condition to keep the estate in repair, as the devisee could not keep an undivided moiety in repair."

Lord WYNFORD, in the House of Lords, observed (Sugden, side page 384), "that he believed that nine hundred and ninety-nine persons out of a thousand would say, on reading this will, that the tes-

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tatrix did intend by it to pass her whole property, and this is a question of intention. He knew that it was decided in *Sir Edward Clere's* case, that a will cannot operate as an execution of a power, unless it refers to the power or the subject of it, or unless the will can have no operation without supposing that an execution of the power was intended. But he conceived that here the estate or subject of the power is referred to in the will, and that this is a case that never occurred before. The words of the will are, 'I give and devise all my estates in London and Surrey,' and she adds a condition to repair, yet it is said that these words may be satisfied by supposing that they refer only to that moiety which she had in absolute property; but he defied any ingenuity to show that the words applied only to the one moiety, and not to the other; that the tenant for life was to repair one moiety, and leave the other unrepaired. The testatrix is clearly speaking of the whole of her property, and this will may be held to apply to all, and to be an execution of the power, in perfect consistency with the doctrine in *Sir Edward Clere's* case."

Chief Justice BEST said, in delivering the judgment of the Common Pleas, "It has long been settled, that an express declaration of the intent to execute a power is not necessary; on the other hand, no terms, however comprehensive, although sufficient to pass every species of property, freehold and copyhold, real and personal, will execute a power, unless they demonstrate that a testator had the power in his contemplation, and intended by his will to execute it. It has often been said that a power is not executed, unless the power or the estate be referred to by the will, or the will can have no effect except as an execution of the power. We are not disposed to say these are the only cases, and we have high authority for saying they are not. They are only put as instances of the strong and unequivocal proof that is required; but if there were a rule that courts of law are only permitted to hold a power well executed in these instances, we should say that this case comes within it, for we think the estate is referred to."

He further said: "We think it impossible to impute any other intention to Mrs. Trymmer than that of executing the power she had reserved to herself in the estate in question; and we think that intention is demonstrated by every part of the will, and particularly by a reference to the estate over which she had this power. Mrs. Trymmer being seized of one undivided moiety, and having a

power over the other undivided moiety, of which power she was the creator, gives all her freehold estates in the city of London and county of Surrey, or elsewhere, to her nephew, John Roake. This is not a description of her interest in the estates, but of the estates, and shows an intent to pass all the property that she had a right to dispose of. I should be inclined to think these words referred to both parts of this property."

Mr. Sugden, in commenting on this case, says: "In a case like *Nowell v. Roake*, the nature of the property might, without introducing any uncertainty into the rule, be considered to manifest a sufficient intention. I hold an estate as an entirety, but the tenure is in moieties, and one is subject only to my appointment; I give, by my will, all my estates to one for life. The rule would exclude that moiety within the power, if it stood there, but I direct that the tenant for life shall keep the estates in repair. The estate cannot be repaired by undivided moieties, although two tenants in common may repair the estate; and therefore the direction might, in favor of the intention, have been held, according to the decision in the Court of Common Pleas, as evidence that she was dealing with the entirety." This, it must be borne in mind, was said by Mr. Sugden from the standpoint that there can be no sufficient demonstration of an intention to execute a power except in the three classes of cases to which we have referred. But, as we have intimated, this standpoint we are not prepared to concede.

In *Blagge v. Miles*, Mr. Justice STORY has criticised the opinion of Lord Chief Baron ALEXANDER, in delivering the judgment of the judges in the House of Lords in this case of *Nowell v. Roake*, and in reaffirming the doctrine as to the enumerated three classes of cases, and he says, "Lord Chief Justice BEST has put these classes of cases upon the true ground. They are instances of the strong and unequivocal proof required to establish the intention to execute the power; but they are not the only cases."

But, to get closer to the substance of the matter now before us: Sarah Funk owned one undivided third of this estate in fee, and, under the will of her deceased husband, she had a life estate in, and full power and authority to dispose of, the other undivided two-thirds as she might think proper, by will or otherwise, before her death. In her last sickness she makes her will, in which, after certain specific bequests of personal property, she makes disposition of "all and singular the rest, residue and remainder of my estate,

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real and personal, of whatever kind and wheresoever situated." By any construction which can be given the will she disposed of the one undivided third that she held in fee, and, so far as the right to hold and enjoy during life and dispose of as she saw fit either before or at death could make it hers, the other two-thirds was hers also. When therefore she spoke of all her real estate, and the undivided one-third was necessarily included, did she not refer also to the undivided two-thirds? In the language of Lord Chief Justice BEST, "This is not a description of her interest in the estates, but of the estates, and shows an intent to pass all the property that she had any right to dispose of."

The case of the property not subject to the power being an undivided interest in the same property the other undivided interest in which was covered by the power, seems never to have arisen before *Nowell v. Roake*. The property not subject to the power to answer the requirement was present there as well as here; but neither that case nor this turns upon the last point determined in *Sir Edward Clere's* case, that "the devise ought of necessity to inure as a limitation of a use, or otherwise the devise would be utterly void." These cases proceed upon another ground entirely. They stand upon the ground of the general intention to be gathered from a consideration of the whole will and from the situation of the property. The fact of co-existing undivided interests, one within and the other without the power, is but one element in the proof of intention, but a circumstance of great weight.

Here, too, the disposition of her real estate of whatever kind was coupled with an order and direction to sell "my real estate," and make all deeds and conveyances "necessary to assure and perfect in the purchaser or purchasers thereof the full title thereto," that is, the title to her real estate, not the title to her interest in the real estate. These words would seem to apply to the whole property and to refer to both parts thereof, as well as that held under the power as that held by a different tenure. And other parts of the will specifically disposed of other property in which she only had a life estate under the will of her deceased husband and a like power of disposition. The evidence shows she had no gold watch except one bequeathed to her for life with the like power of disposition, and that most of the furniture she had was held by like tenure and with like power of disposition. And yet, just preceding the disposition of her real estate, she bequeathed "my gold watch" to the

nephew and namesake of her husband, and she bequeathed "all my household furniture" to her daughters. Now, she had no authority to bequeath the watch and the furniture which had been her husband's, except by virtue of the power in her husband's will. She had in such property, strictly speaking, only a life estate with full power of disposition before her death. That she did exercise the power of disposition delegated by the prior will, in reference to these articles of personal property, and then proceeded to dispose of "my" real estate, using the same language she had used in bequeathing the chattels "my watch," "my furniture," would seem to afford strong evidence she intended her will to work not only by the interest, but by the power. It has been long settled that a will may operate both as an appointment under a power and as a conveyance of an interest. All that is required is that it should appear it was so intended.

In *Hughes v. Turner*, 3 My. & K. 666, the Master of the Rolls, Sir JOHN LEACH, said: "There is a gift here of a gold watch, piano forte and music books, which she could only dispose of by the execution of her power. It is argued, that she had assumed and treated these as her own property, independently of her sister's will. No such inference judicially arises. A gift of the rest, residue and remainder of her real and personal estate imports a gift of the rest and residue of that estate which she considered her own and had previously partly disposed of. A gift of that which a testator cannot dispose, except in execution of a power, necessarily manifests an intention to execute that power." The matter of the Cardiganshire estate was also relied on by the Master of the Rolls in this case, but the decision of the House of Lords in *Bowes v. Bowes*, effectually disposed of the Cardiganshire matter. And so the cause came up again for a rehearing before Sir C. C. PEPPYS, his successor as Master of the Rolls. It is true the judgment was otherwise upon the rehearing, principally by force of the *Bowes* case, but upon this point now in review the consideration of the court only was that a reference to part of the subject, or to some of many subjects of the power, will not be sufficient to make a will operate as an execution of the power, when there is no other indication of an intention to execute it. But here, we think there are other indications of an intention to execute, and we only regard the bequests of the watch and furniture as cumulative evidence, derived from the face of the will itself, of the intent.

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When the subject of the power is real estate, and the question is as to the execution of the power by the devise, it is the well-settled doctrine you may always look at the condition of the property and the facts *dehors* the will to arrive at the intention of the testator. These facts are, in addition to the evidence in regard to the watch and furniture, that Sarah Funk held, under the will of her deceased husband, a life estate in two-thirds of the south thirty feet of lot 6, with power to dispose of the same as she thought fit; that after the death of her husband she purchased the other undivided one-third interest, and the same was conveyed to her in fee; that she also purchased other real estate in fee, and that at the time of the execution of her will and of her decease she held the entirety of said south thirty feet, one-third in fee simple absolute, and the other two-thirds for life, with full power of disposition by will or otherwise. There is no judicial presumption that at the time she made the devise she had forgotten either that she owned this thirty feet, or by what tenures she held it, or that she had power of appointment under the will of Absalom Funk as to the undivided two-thirds. The presumption would be she knew her own titles, and the powers she had in reference to the property she held and enjoyed. This presumption is made manifest fact when we see her disposing in her will of property which she could legally only dispose of by virtue of the powers in the first will. It would hardly be contended the gift of the watch was not a valid execution of the power in the first will, so far at least as that watch is concerned. But it was not a good execution of the power unless she intended to execute it. The fact she did specifically execute it conclusively establishes that she had such intention, and having such intention, she must have known and remembered the power vested in her by the first will. She thus knowing and remembering the powers she had, and devising all her real estate to trustees to be sold as soon as the same could be done, and the proceeds divided among her children and grandchildren, is there any reasonable and consistent theory other than that she intended to execute the power, and wished the entirety of the thirty feet of ground sold? Again, there is this further fact *dehors* the will, that in the absence of an appointment by her, the undivided two-thirds interest she had under the power would have to be divided among two hundred and twenty-two heirs of her deceased husband. So that unless we find an intent to act by the power, she was leaving an undivided one-third

interest in this small parcel of land to be held in common with two hundred and twenty-two tenants of the undivided two-thirds interest. This would appear absurd, especially when considered in connection with the injunction for a speedy sale of her estate, and the caution in her will against any sacrifice of her property.

It is a question of intention. If it were only admitted that the rules by which that intention may be ascertained were not fixed and settled, then it cannot be doubted but that the evidence afforded by this will and this record establishes that intention beyond a reasonable doubt. If the intention is clear and manifest, it is all that is required by that which we have designated as the fundamental rule; to require more would be, as is suggested by Justice STORY, to make "the cases govern the general rule as to intention, and not the rule the cases."

The demands of substantial justice do not require we should follow the subtle niceties of some of the English cases, and such course would be inconsistent with the liberal rules we have heretofore announced should govern in the ascertainment of the intentions of testators.

The English parliament has radically changed the law of that country by the statutes of 7 Will. IV, and 1 Vict., ch. 26; and that, too, to such an extent that a general devise now operates as an execution of a general power of appointment, unless a contrary intention appears. As we have seen, Justice STORY refused to follow the technical rule established by some of the cases.

In *Andrews v. Brumfield*, 32 Miss. 108, and in *White v. Hicks*, 33 N. Y. 383, the courts expressly repudiated the doctrine of the English cases establishing that the amount of the testator's personal property could not be inquired into to show an intention to execute a power of appointment, and the decisions were in no way predicated upon local statutes. And in *Amory v. Meredith*, 7 Allen, 397, the Supreme Court of Massachusetts, also in the absence of any statutory provision, decided in the very teeth of the rule said to be deducible from *Clere's* case; and the case is a strong one to show the rank injustice that might be done by an adherence to that rule.

There are no former decisions of this court that militate against the rule we now announce. In *Wimberley v. Hurst*, 33 Ill. 173, we remarked that where a conveyance is general it will be held as an execution of a power, if it would be otherwise wholly inoperative.

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This is a mere reiteration of the real point in *Clerc's* case, *et res magis valeat, quam pereat*. It is entirely consistent with what we now hold; and we are ready to repeat it when occasion requires. In *Coffing v. Taylor*, 16 Ill. 474, and in *Davenport v. Young*, id. 552, the court was speaking in reference to the construction to be given to deeds and not in regard to wills, and what was said in those cases was properly said under the circumstances of the cases then before us. As was said by us in *Butler v. Huestis*, 68 Ill. 596, "we are disposed to regard what we must know was the clear intention of the testatrix, which we gather from the will itself when construed in connection with the power, as the all-controlling element in the decision of the case. If we are to interpret wills in the light of precedents, we ought to follow those that are most in harmony with the genius and laws of this country, and the manners and customs of its people. We ought rather to be guided by those that would most effectually do justice."

We prefer, then, to follow the broad and liberal rule announced by Lord COKE in *Scrop's* case, and by Mr. Justice STORY in *Blagge v. Miles*, and that is based upon principle, and thus carry into effect the intention of the testatrix, rather than to defeat such intention by following the narrow and technical rule predicated upon the cases. The provisions of the whole will taken together and the facts *dehors* the will clearly indicate, to our minds, an intention to pass the whole estate, and we think the devise should, in favor of the intention, be held to work both by the interest and by the power, and to pass the entirety.

We find no error in the record, and the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

RICHARDS V. RAYMOND.

(92 Ill. 612.)

Constitutional law — high schools.

Under a constitutional provision that the legislature shall provide a thorough and efficient system of free schools for the conferring a good common-school education, a statute authorizing the establishment and maintenance of township high schools, on a vote of the people, is valid.

BILL to enjoin the collection of a school tax. The opinion states the case. The defendant had judgment below.

G. S. Eldridge, for appellant. The school established, as set forth in a bill, is not such a school as can be said to fall within and constitute a part of a thorough and efficient system of common-school education, whereby its benefits may be practically available to all the children of the State. This is shown by the bill, and is a fact of which this court must take judicial notice, that is,— what is a common-school education, as provided in the statute. The law being unconstitutional the tax is void, *People v. McAdams*, 82 Ill. 356; *People v. Mayor, etc.*, 51 id. 17; *People v. Salomon*, id. 47; *Fisher v. People*, 84 id. 491; Const. of 1870, art. 9, §§ 9, 10; Const. of 1848, art. 9, § 5.

Mayo & Widmer, and *E. F. Bull*, for appellee.

CRAIG, J. This was a bill in equity, to enjoin the collection of a tax levied to sustain a high school established in township 31, range 3, in La Salle county, under the provisions of section 35 of the School law (Rev. Stat. of 1874, p. 957), which is as follows :

“Upon petition of fifty voters of any school township, filed with the township treasurer at least fifteen days preceding a regular election of trustees, it shall be the duty of said treasurer to notify the voters of the township that an election for and against a high school will be held at the next ensuing election of trustees, and the ballots to such effect shall be received and canvassed at such election; and if a majority of the voters at such election shall be found to be in favor of a high school, it shall be the duty of the trustees of the township to establish at some central point, most convenient for a majority of the pupils of the township, a high school for the education of the more advanced pupils.”

The sole ground relied upon to enjoin the collection of the tax is, that this section of the statute is unconstitutional,— that it is in conflict with section 1 of article 8 of the present Constitution, which provides that the General Assembly shall provide a thorough and efficient system of free schools whereby all children of the State may receive a good common-school education. This provision of the Constitution was doubtless intended as a limitation upon the

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power of the legislature to provide for the maintenance of free schools by local taxation of a different character from that named in the section. In other words, under the section of the Constitution the legislature has the power to enact laws under which a thorough and efficient system of free schools may be established and maintained by local taxation, in which all the children of the State may receive a good common-school education, but to go further than this, the legislature would seem to be powerless. We cannot perceive what other purpose was designed by the section of the Constitution. It could not have been intended as a grant of power to the legislature, for the reason that the legislature has the power to enact any and all laws proper for the government or welfare of the people of the State not prohibited by the Constitution of the United States or of this State. It is not the mission of a Constitution of a State to confer power upon the law-making department of the State, but to limit and restrain the power which it possesses independent of Constitutions. We are therefore satisfied, as the section of the Constitution could not have been designed as a grant of power, it was intended as a limitation upon the power of the General Assembly.

But, conceding that the section of the Constitution referred to is a limitation upon the power of the legislature, it by no means follows that the section of the statute in question is in conflict with the Constitution.

It has been well said that the question, whether a law is void for repugnancy to the Constitution, is at all times a question of delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. Potter's Dwarries on Stat. 65. The same principle was announced in *People v. Marshall*, 1 Gilm. 672, where it was held that it was well settled by the highest tribunals of the nation that it is seldom, if ever, in a doubtful case, or upon slight implication, that the court should declare the legislature to have transcended its authority. The opposition between the law and the Constitution must be clear and strong in the judgment of the court, otherwise it cannot pronounce the law to be void. With these well recognized principles in view, can the statute be held to be in conflict with the spirit of the Constitution.

The act in question provides that the school trustees of a township, where the legal voters of the township have decided in favor of the proposition at an election held for that purpose, shall establish a high school in the township for the education of the more

advanced pupils. A school of this character is certainly a free school, within the meaning of the Constitution. That free schools may be graded and classified so that scholars that may be more advanced in their studies may not be hindered or delayed in the progress of their studies by others less advanced, would seem to be within the spirit of the Constitution, that contemplates the creation of a thorough and efficient system of free schools. That one school may be denominated a high school, and another in the same township a district school, cannot affect the question in the least.

But the argument is that the school established is not a common school or a school where the children of the State may receive a good common-school education, and hence inhibited by the Constitution. No definition of a common school is given or specified in the Constitution, nor does that instrument declare what course of studies shall constitute a common-school education. How can it be said that a high school is prohibited by the Constitution and not included within the definition of a common school? The phrase, "a common-school education" is one not easily defined. One might say that a student instructed in reading, writing, geography, English grammar and arithmetic had received a common-school education, while another, who had more enlarged notions on the subjects might insist that history, natural philosophy and algebra should be included. It would thus be almost impossible to find two persons who would in all respects agree in regard to what constituted a common-school education.

Indeed, it is a part of the history of the State when the Constitution was framed, that there was a great want of uniformity in the course of study prescribed and taught in the common schools of the State. In the larger and more wealthy counties the free schools were well graded and the course of instruction of a high order, while in the thinly settled and poorer counties the old district system was still retained and the course of instruction prescribed was of a lower order.

At the time of the adoption of the Constitution there was a wide difference of opinion in different parts of the State, as to what constitutes a common-school education, and we apprehend that a Constitution which would have impaired in any degree the free high school system in existence in many portions of the State would not have received the approval of the voters of the State. But however that may be, while the Constitution has not defined what a

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good common-school education is, and has failed to prescribe a limit, it is no part of the duty of the courts of the State to declare by judicial construction what particular branches of study shall constitute a common-school education. • That may be and doubtless is a proper question for the determination of the legislature, and as a law has been enacted by it, which does not appear to violate the Constitution it is not the province of the courts to interfere.

But it is insisted that the directors of the school have, in the course of study adopted, provided for teaching the higher branches, such as are taught in the various colleges of the country. If the directors of the high school have established a course of study not authorized by law, doubtless there is a remedy in favor of those interested in the school, but that fact affords no ground for relief here.

It is conceded that the proceedings under which the school was established were regular. If the law was constitutional, then the levy and collection of a tax to maintain the school was proper, although the course of study prescribed was different from that contemplated by law.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

PEOPLE EX REL. MCCREA V. UNITED STATES OF AMERICA.

(93 Ill. 30.)

Taxation — Federal property.

Property, the title to which is held by the United States, for whatever purpose, is exempt from State taxation while so held.

THE opinion states the case.

Francis Adams, for appellants.

John P. Wilson, for appellee.

SCOTT, J. Application was made by the county collector to the County Court of Cook county, at the July term, 1879, for judgment

for taxes on delinquent lands and lots, due thereon for the year 1878 and other previous years, and among others for judgment against the lots described in the objections filed in the name of the United States by the district attorney for the northern district of Illinois, in which the lots are situated. It is sufficiently proven that the United States government acquired the title to the lots in question under the provisions of the Revenue Law of the United States, during the years 1870 and 1871. It appears a deed was made by the proper officer designated in the statute, conveying the lots to the United States, and that title so acquired, whatever it was, the United States held without question from any one until May, 1879, at which time the government, by its officers, leased the same to Ogden for a period of ninety-nine years.

It was during the years prior to the leasing, and during the time the title to the property appeared to be in the United States, that the taxes for which judgment is sought were levied. It does not appear that during that period any citizen of this or any other State claimed any interest in the property assessed, but the title on the record seemed to be in the United States.

The defense made is, that lands the property of the United States are not subject to taxation by the State. An argument against such taxation is based on that provision of the ordinance of 1787, adopted for the government of territory of the United States northwest of the Ohio river, of which Illinois was a part, which declares in section 4, among the restrictions imposed upon the State to be formed out of such territory, that "no tax shall be imposed on lands the property of the United States."

Conceding the clause of the ordinance of 1787, cited, is still in force, and binding on the State, it would seem to be an absolute inhibition upon the State to impose any tax upon lands the property of the United States, no matter how the title might be acquired, nor for what purpose held. It was ordained that the six articles enumerated shall be considered as articles of compact between the original States and the people and States in such territory, and forever remain unalterable unless by common consent.

In *Phæbe v. Jay*, Breese, 268, it was said, the ordinance was, no doubt, binding upon the people of the States unless abrogated by "common consent." By "common consent" was understood to be by action of the United States and the people of the States affected. Congress, having admitted Illinois into the Union with the Con-

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stitution adopted, gave consent to the abrogation of so much of the ordinance of 1787 as was inconsistent with that instrument, but such provisions as were not in opposition to our Constitution were held to be binding on the State. McLEAN, J., on the Circuit, expressed substantially the same views, in two cases heard before him: *Spooner v. McConnell*, 1 McLean, 337; *Palmer v. Commissioners*, 3 id. 226. The Supreme Court of the United States, however, seem to have adopted the view that the ordinance of 1787 is not in force in the States since formed within the territory mentioned and admitted into the Union on an equal footing with the original States. The question was raised and discussed in *Permoli v. First Municipality*, 3 How. 589. The act of Congress of April, 1798, extended the ordinance of 1787 to the then territory of Mississippi with the exception of the anti-slavery clause, and declared the people of the Territory should be entitled to and enjoy all the rights and privileges and advantages granted to the people of the territory north-west of the Ohio river, and by the act of March 2, 1805, it was enacted that the people of the then territory of Orleans should have all the rights, privileges and advantages under the ordinance of 1787 then enjoyed by the people of the Mississippi territory.

Although the decision in *Permoli v. First Municipality* was confined to the Territory in which it arose, TANEY, C. J., in remarking upon it in *Strader v. Graham*, 10 How. 82, said: "When it is decided that this ordinance is not in force in Louisiana, it follows it cannot be in force in Ohio." It may be added, as a matter of course, if the ordinance is not in force in Ohio, it cannot be in force in Illinois. An elaborate discussion of the effect of the ordinance of 1787, and of the acts of Congress extending it to other territory, was had in *Pollard v. Hogan*, 3 How. 212, and Chief Justice TANEY, in *Strader v. Graham*, refers to the opinion delivered in that case and expresses his concurrence in the reasoning and principles by which the judgment was maintained.

The question raised is one of grave importance, and without expressing any definite opinion as to whether the clause of the fourth section of the ordinance of 1787, cited, has been changed or annulled by competent authority, or whether it is still binding as an inhibition on the taxing power of the State, we think the present judgment may be maintained on other grounds.

It is said the taxing power of the State is one of its attributes of sovereignty, and where there is no restraining compact with the

Federal government, nor no cession of inconsistent jurisdiction in the United States, it extends to all property in the State and may be exercised upon every object brought within its jurisdiction. But broad and comprehensive as this power of taxation existing in the State is conceded to be, it has not been considered so extensive as to embrace property regarded as the instruments or means of conducting the Federal government in pursuance of the Constitution, nor to subjects over which the sovereign power of the State does not extend. Such property has always been conceded to be exempt from taxation by State governments. The cases sustaining these general propositions of law are of conclusive authority with us. *Fagan v. City of Chicago*, 84 Ill. 233; *Transportation Company v. City of Wheeling*, 9 Otto, 273; *McCulloch v. State of Maryland*, 4 Wheat. 429; *Nathan v. Louisiana*, 8 How. 82. No argument is made against these propositions, now so generally conceded as to be regarded as almost self-evident. But the position taken is, that the power of the State to tax extends to all objects and property within its jurisdiction except when the exercise of such power is prohibited by the Federal Constitution, and also except the means and instruments employed by the Federal government in the execution of the powers conferred in pursuance of the Constitution; and as there is no inhibition in the Federal Constitution against taxing such property as that involved, and as it is not an instrumentality employed by the government, it is said it is subject to the taxing power of the State notwithstanding the title may be in the United States. The principal case cited in support of this view of the law is *McCulloch v. State of Maryland*, but that case does not sustain the proposition as broadly as it is stated. That case, remarkable as well for the force of its logic as for the importance of the questions discussed, holds that a law passed by the legislature of the State of Maryland imposing a tax on the bank of the United States is contrary to the Constitution of the United States, and therefore void. Commenting briefly on the results to flow from the decision announced, it was said, it does not deprive the States of any resources which they originally possessed—that it does not extend to a tax paid by the real property of the bank in common with other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution in common with other property of the same description throughout the State.

The case of *Nathan v. Louisiana* declares the same general

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principles. The decision is that a State law which imposes a tax on an exchange and money broker is not repugnant to the constitutional power of Congress to regulate commerce. It will be observed the property declared to be subject to State taxation belonged to citizens of the State imposing the tax, and in which the United States had no interest whatever.

Although the power to impose taxes resides in the States as well as in the United States, yet a State cannot, without the consent of Congress, levy tonnage duty on vessels or ships, but the vessels themselves may be, and are, regarded as the subject of State taxation. That is upon the principle that lies at the foundation of all the cases on this subject, viz., that the property subject to State taxation is properly owned, managed and controlled by private persons or corporations in favor of private interests.

Ample as the State power of taxation undoubtedly is, it does not, as we have seen, reach the means and instruments of the Federal government, nor to the administration of justice in the Federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of Congress. The reason is obvious, and it is that the power to tax involves the power to destroy. An unlimited power of taxation existing in the Federal or State governments would result in consequence of interfering powers as expressed by Chief Justice MARSHALL, in *McCulloch v. State of Maryland*, in the right of one government to pull down what there is an acknowledged right in another to build up, or in the right in one government to destroy what there is the right in another to preserve.

In the case at bar the title to the property sought to be subjected to State taxation was acquired by the United States under the General Revenue Law, and if the State, under the pretense of the taxing power, may destroy that title, there would evidently follow a clashing of sovereign authority, or the destruction by one government what another has the acknowledged right to preserve. This ought to be avoided. No doubt the power to tax the property of the citizen may be exercised at the same time upon the same objects of private property by the State and the United States without inconsistency or repugnancy, but that implies the subject of taxation is private property of the citizen or of a private corporation. The moment the title to the property becomes vested either in the State or the United States, the property is no longer the subject of taxa-

tion. It does not seem it makes any difference whether the property is used as a means of instrumentality for the execution of any of the powers of the Federal government under the Constitution. It is sufficient if the title is in the United States — the exemption from taxation attaches. *McGoon v. Scales*, 9 Wall. 23; *Railway Co. v. Prescott*, 16 id. 603. We have not been referred to a single case that declares property to be the subject of State taxation where the title is in the United States, no matter for what purpose it was held.

The question involved is one of great importance, and although we have not elaborated the discussion to any great length, we have given the case the fullest consideration, and our conclusion is that as the title to the property was in the United States during the years the taxes sought to be collected were respectively assessed, the levies were without authority of law and hence void.

Whether the property in the hands of the lessee, or his interest in it, be it what it may, will hereafter be subject to taxation under our State laws, is a question that cannot arise on this record, nor do we think it is a matter of any consequence who files the objection to the taxes — whether it is done by the lessee or by the United States by the proper officer. If the property were not subject to taxation the State should not be permitted to embarrass the title by a tax sale, and it would seem the law officer of the United States resident in the district where the property is situated would be a proper person to interpose objections on behalf of the government.

The judgment will be affirmed.

Judgment affirmed.

NICHOLS V. SCHOOL DIRECTORS.

(93 Ill. 61.)

Schools — religious use of school-house.

A statute authorizing school directors to grant the temporary use of public school-houses, when not occupied by schools, for religious, literary and other meetings, and for evening and Sunday schools, is not unconstitutional.

Nichols v. School Directors.

BILL for injunction. The opinion states the case. The bill was dismissed below.

L. E. Payson, for appellant.

W. T. Ament and *S. S. Lawrence*, for appellees.

SHELDON, J. This was a bill for an injunction by complainant as a citizen, taxpayer and freeholder of the school district of which defendants were directors, to restrain them from allowing the school-house of that district to be used by any society or organization for the purpose of a religious meeting-house.

The grievance as set forth in the bill is that the defendants have, as such directors, given permission to different church organizations to hold religious services in the school-house, against the protest of complainant and other taxpayers of the district; that under this permission some of the church organizations purpose holding stated meetings in the school-house; that by this means complainant is compelled to aid in furnishing a house of worship, and for religious meetings, contrary to the law of the land; that he is opposed to such use of the house by the societies, and that such meetings are about to be held in the same contrary to his wishes, wherefore he prays the injunction.

A demurrer was filed to the bill, which the Circuit Court sustained, and dissolved the temporary injunction which had been granted, and dismissed the bill. The complainant appealed to this court.

By statute, the supervision and control of school-houses is vested in the school directors of the district, and "who may grant the temporary use of school-houses, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and for literary societies, and for such other meetings as the directors may deem proper." Rev. Stat. 1874, p. 958, § 39.

There is clearly sufficient warrant in the statute, if that be valid, for the action of the school directors.

But the statute is assailed as being unconstitutional. The clauses of the Constitution which are pointed out as being supposed to be violated by this statute are the following only: "No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any

religious denomination or mode of worship." Art. 2, § 3. Art. 8, § 3, forbidding, among other public bodies, the general assembly or any school district from ever making any appropriation or paying from any public fund whatever any thing in aid of any church or sectarian purpose, etc.; and forbidding the State or any public corporation from making any grant or donation of land, money or other personal property to any church or for any sectarian purpose. "All lands, moneys, or other property, donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made." Art. 8, § 2.

It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions.

The latter one relates to the subject of a gift or grant, which this school-house is not shown to be, and if it were, it is not perceived wherein an incidental use of the house for the holding of religious meetings, not in any way in interference with school purposes, would in any reasonable sense be inconsistent with its faithful application to the object of the gift or grant.

The second provision respects the making of an appropriation or payment from some public fund in aid of any church or sectarian purpose, and it cannot be claimed that this contemplated use of the school-house is such.

In what manner, from the holding of religious meetings in the school-house, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly, at some future time, he might as a tax payer be made to contribute to the expense of repairs rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the school-house might, in that way, cause damage in some degree to the building, upon the idea that continual dropping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim *de minimis*, etc.

The thing contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law

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by which a person should be compelled without his consent to contribute to the support of any ministry or place of worship.

Such a matter as the subject of complaint here, we do not regard as within its purview.

Religion and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and thereby, the same as is complained of here, there might be indirectly imposed upon the tax payer the burden of increased taxation, and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the Constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the school-house. There is no pretense that it is in any way in interference with the occupation of the building for school purposes.

We think the court rightly sustained the demurrer and dismissed the bill, as making no case for an injunction.

The decree will be affirmed.

Decree affirmed.

KELLOGG V. TURPIE.

(93 Ill. 265.)

Contract — rescission — remedy.

Where a vendor rescinds a sale of goods on credit for fraud, the remedy is trover or replevin, and assumpsit will not lie until the expiration of the term of credit, unless the goods have been converted into money or money's worth.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Stephen R. Moore, for appellants.

SHELDON, J. This was an action of assumpsit, to recover the value of certain bills of goods purchased by the defendant of the plaintiffs on the 20th day of December, 1875, and in January and February, 1876, on a credit of four months. The suit was commenced March 1, 1876.

The declaration contains a special count setting forth, in substance, the sale of the goods to the defendant upon a credit of four months, through and on account of false and fraudulent representations made by the defendant as to his pecuniary responsibility, for the price of \$1,124.35, and that that was the value of the goods; that plaintiffs first learned of the false and fraudulent character of the representations on the last day of February, 1876, and that immediately thereupon they rescinded the contract of sale so made as aforesaid on credit, and demanded payment immediately of the value of the goods at the time of the purchase, which defendant refused to make.

The Circuit Court sustained a demurrer to the declaration, and gave judgment for the defendant. On appeal to the Appellate Court for the second district the judgment was affirmed, and an appeal taken to this court.

The declaration clearly enough presents a case of fraud, entitling the plaintiffs to rescind the contract of sale made on a credit, and the question which is presented is whether, upon making such rescission of the contract, the plaintiffs may bring this action of assumpsit to recover what the goods were reasonably worth, or are restricted to an action in tort, of trover or replevin.

Where such a fraudulent contract is rescinded by the vendor, as it may be, the contract is treated as a nullity, and the defendant considered not as a purchaser of the goods, but as a person who had tortiously got possession of them, and the form of action in such case is in trover or replevin for the tort. But this action of assumpsit proceeds upon the ground of a contract made between the parties and existing at the time of action brought, and that the goods were rightly obtained by purchase. Now the only contract appearing by the declaration between the parties is an express contract for the sale of the goods upon credit. The time of credit had not expired when the suit was commenced, and it was prematurely brought on the contract which was actually made. Where there is an express contract, the law will not imply one. It is not admissible to say there was a different implied contract, where there was an express one.

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Nor can the contract be rescinded in part, and affirmed as to the residue. The plaintiffs, if they treat the transaction as a contract at all, must take the contract altogether, and be bound by its specified terms. By bringing this action, plaintiffs affirm the contract made between them and the defendant. This we believe to be the doctrine upon the subject as resting upon principle, and established by the weight of authority.

In such cases, says Chitty, in his work on Contracts, vol. 1, pp. 569-70: "The vendor must either affirm or disaffirm the contract as a whole. And therefore, where goods are fraudulently procured to be sold on credit, the vendor cannot sue for the price before the credit has expired, but he must sue in tort for the value of the goods, for by declaring for the price he affirms the contract, and where there is an express contract the law will not imply any other."

To the same effect is Story on Sales, § 446, that "Where goods have been obtained through the fraud or misrepresentation of the vendee, the vendor may either affirm the sale or rescind it and reclaim the goods. If he elect to rescind he must, as we have seen, do so within a reasonable time, and must take care to do nothing affirmatory of the contract, or his right to rescind will be lost. And in such case he should sue in trover or replevin for the goods, treating the whole contract as utterly nullified by the fraud, and he should be careful not to bring assumpsit, since, as the foundation of this action is the promise of the vendee, the contract is thereby directly affirmed, and his rights will depend upon the contract solely." In full support of the text of these writers and the views we have expressed are *Read v. Hutchison*, 3 Camp. 351; *Ferguson v. Carrington*, 9 B. & C. 59; 17 E. C. L. 330; *Strutt v. Smith*, 1 C., M. & R. 311; *Selway v. Fogg*, 5 M. & W. 83.

In *Allen v. Ford*, 19 Pick. 217, the same doctrine is declared, where the court say: "If the plaintiff rescinds the contract, as he would have a right to do, the defendant failing to perform the condition of sale, his proper remedy for a conversion of the property is an action of trover. And he cannot waive the tort and recover the value of the goods in an action of assumpsit. In such a form of action the contract is admitted to exist at the time of the action brought, and where there is an express contract the law will not imply one." To like effect are *Delton v. Hull*, 47 Md. 112; *Whitlock v. Heard*, 3 Rich. 88.

The decisions in New York appear to be in favor of the maintenance of such an action as the present.

In *Roth v. Palmer*, 27 Barb. 652, the court, speaking upon the subject of the election which the vendor has in the case of a fraudulent purchase of goods, to sue in assumpsit rather than tort, say: "Originally, and particularly in the English courts and in Massachusetts, a distinction was attempted to be established as to the cases in which the plaintiff should be allowed his election, and to confine it to cases where the fraudulent purchaser had parted with the goods and received money on his sale of the same, which the courts allowed the plaintiff to treat as money had and received to the plaintiff's use. *Bennett v. Francis*, 2 B. & P. 550, 555; *Jones v. Hoar*, 5 Pick. 285. But the cases in our own courts recognize no such distinction. They seem to allow it to be done in all cases where the plaintiff would have been allowed to pursue his remedy in tort, and the decisions in this court have been too numerous and too uniform to allow us now to set up any distinction or limitation even if it were desirable on principle."

But there is no course of decisions in this State which requires of us any departure from principle and the prevailing authority upon this subject. This court has recognized the distinction above, which the New York courts would seem not to do, and has held that where goods have been obtained tortiously, in order that assumpsit can be maintained it is essential that the wrong-doer should have sold the goods or in some way converted them into money or money's worth. *Creel v. Kirkham*, 47 Ill. 344; *Johnston v. Salisbury*, 61 id. 316. In *Wigand v. Sichel*, 3 Keyes, 120, the court, although sustaining the action of assumpsit in a case like the present, do so upon a different ground from that in *Roth v. Palmer*. "It is not accurate," say the court, in the former case, "to say that the plaintiffs sought to avoid the contract of sale. It is the credit only that is sought to be avoided. It was a sale of goods which the plaintiffs, by their action, affirmed. It was, however, a sale where the credit was obtained by fraud, and in law amounted to a sale for cash. In stating it in their complaint therefore to be a sale, and for cash, the plaintiffs but stated the contract according to its legal effect. They did not seek to avoid the contract of sale. They endeavored, merely by proof of the act of fraud, to reduce the transaction to a cash sale."

We have held that where a party rescinds a contract on the ground

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of fraud, such rescission must be total ; a portion of the contract cannot be affirmed and a portion repudiated. *Bowen v. Schuler*, 41 Ill. 193 ; *Ryan v. Brant*, 42 id. 78 ; *King v. Mason*, 42 id. 223.

We adopt with approval the following language of PILLSBURY, J., who delivered the opinion of the appellate court in the case at bar, in comment on this case of *Wigand v. Sichel*: "The goods were procured by a contract, though fraudulent, one of the constituent parts of which was that time should be given for the payment thereof. With reference to this credit the amount to be paid for the goods was determined, and we are unable to see how the credit was obtained by fraud distinct from the other terms of sale, or how the credit can be avoided, or the sale be affirmed, with a different time of payment fixed without the consent of the purchaser. If in such a case the credit is the only part of the contract resting upon the fraud, and that can be severed from the other terms of sale, then it necessarily follows that the credit is the only portion of the contract that can be repudiated, leaving the contract of sale in full force in other respects, or as the New York court expresses it, 'it becomes a sale for cash.'

"If, then, the legal effect of the contract after such disaffirmance is a sale for cash, the vendee is in no sense a wrong-doer, and the defrauded vendor cannot thus treat him and reinvest himself with the title to the goods, which, we believe, is not considered good law anywhere."

We regard the New York decisions upon the subject as variant from the current of authority, and we are not satisfied with the principles upon which they are rested.

The difficulty in the way of this suit is not avoided by saying, as appellant's counsel does, that the action is not brought for the agreed price of the goods, but for the price the goods were reasonably worth, and therefore the special contract which was made is not affirmed, because not sued upon, but that the suit is upon an implied contract to pay what the goods were reasonably worth. The rule as stated in some of the authorities cited is, that where there is an express contract the law will not imply one.

As said by PARKE, B., in *Strutt v. Smith*, *supra*: "It is clear that the plaintiffs cannot avail themselves of the defendant's fraud so as to rescind the contract and substitute a new contract of sale on different terms. * * * They might possibly, on the evidence, have maintained trover, on the ground that the fraud vitiated the

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contract, but if they treat the transaction as a contract at all, they must take the contract altogether, and be bound by the specified terms."

The earlier case of *DeSymons v. Minchwich*, 1 Esp. 430, cited as in favor of this action, is overruled by the later English decisions.

Other cases cited by appellants' counsel are where goods obtained under a fraudulent contract had been disposed of, and it was held that assumpsit would lie for the money received; or where money had been received upon such a contract, and upon its rescission assumpsit for money had and received was held sustainable; or where some security, as a bill or note, payable at a future day, had been taken in payment for goods which had been sold, and the security turned out to be worthless, and an action was held to lie immediately for the price of the goods sold, on the ground that there had been no payment made for them.

There is a plain distinction between all such cases and the one now before us.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

 CHICAGO AND NORTH-WESTERN RAILROAD CO. V. MORANDA.

(93 Ill. 802.)

Master and servant — negligence — co-servants.

A fireman on a locomotive engine carelessly threw a lump of coal from the tender, which struck and killed a track repairer, servant of the same company, standing near. *Held*, that the company was liable in damages.*

ACTION of damages for negligence. The opinion states the case. The plaintiff had judgment below.

B. C. Cook, for appellant.

A. K. Trusdell and *J. D. Crabtree*, for appellee.

DICKEY, J. John Moranda was the foreman of a party of track repairers, whose duty it was to repair and keep in order a section

*Followed, *C., R. I. & P. R. Co. v. Henry*, 7 Bradw. 822, as to one loading a freight car, and a switch tender.

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of the railroad track of appellant, and to be upon the track and see that it was kept in order for the running of trains. The hypothesis on which it is sought to sustain the recovery in the Circuit Court in this case is, that while Moranda was so engaged in this duty an express train passed by at the rate of some thirty to thirty-five miles an hour; that on the approach of the train to the place where Moranda and his party were at work on the track they stepped aside to avoid the passing train, he standing some five or six feet from the nearest rail of the track; and that as the train passed, a large lump of coal was carelessly cast by the fireman from the tender attached to the locomotive, which struck Moranda and caused his death.

This is an action, under the statute, by the administratrix of the estate of deceased. Appellant pleaded not guilty. A trial by jury resulted in a verdict of guilty, and an assessment of plaintiff's damages at the sum of \$4,000, and after overruling a motion for new trial, the court rendered judgment upon the verdict.

[Omitting a minor point.]

There is, however, another question raised by counsel for appellant which will necessarily arise upon another trial, and ought therefore to be decided now.

It is insisted that "the plaintiff's intestate and the persons running the locomotive bore such relation to each other in the service of appellant, that one could not recover of the common employer damages caused by the negligence or carelessness of the other."

We think this position is not tenable. In *Chicago and North-western Railroad Co. v. Swett*, 45 Ill. 197, a case in which the fireman was killed by reason of the negligence of the track repairers, it was held that the doctrine in relation to fellow-servants did not forbid the action.

In *Chicago, Burlington, and Quincy Railroad Company v. Gregory*, 58 Ill. 272, the right of action was sustained where a fireman on a passing train was killed by a "mail catcher" improvidently placed too near the track by other servants of the railroad company.

In that case it was said the agents charged with the duty of properly locating the "mail catcher" had no possible connection with the running of the trains, in which service the fireman was engaged, and it was added: "The duties were as different and as distinct as those of a conductor and of a track repairer."

In *Toledo, Wabash and Western Railway Co. v. O'Connor*, 77 Ill.

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391, the plaintiff's intestate was, as in this case, a track repairer, and the injury was caused by the negligence of another servant of appellant, engaged at the time in running a train upon the track. There, the fault was that of another servant of the company — the engineer on the passing train. Here the alleged fault was that of the fireman. It is not perceived how this case differs from that in principle. It was there held that the track repairer and the engineer of a passing train were not fellow-servants, engaged in a common service, so as to exempt the employer from liability for the injury of the one by the neglect of the other.

Unless we are to overrule these, and other decisions of this court, we cannot sustain the appellant in the proposition that this action is barred by the relation of these servants as fellow-servants.

Counsel for appellant presses upon our attention what was said by this court in the case of *Chicago and Alton Railroad Co. v. Murphy*, 53 Ill. 336 ; s. c., 5 Am. Rep. 48. In that case the servant injured was one of a party of laborers at a station, whose ordinary duties were to examine arriving trains, and take out for repairs any cars in the train needing the same. The injury was caused by the negligence of the engineer operating the switch-engine used at that station for that purpose. This court, upon the facts of that case, held that the servant injured and the offending engineer "were strictly fellow-servants of a common master, * * * engaged in the same general department, to-wit: the doing of the needed work upon the depot grounds for the purpose of dispatching the various trains." And it was there said: "Under these circumstances we are wholly unable to hold * * * that deceased and the engineer were not fellow-servants in such a sense as to subject them to the well-established rule exempting the common master from liability in cases of this character."

After having thus pronounced the judgment of the court upon the question arising upon the facts of the case, the learned justice who delivered the opinion of the court proceeds to comment upon an instruction which the Circuit Court had refused to give to the jury, and says, in that connection: "When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be * * * regarded as fellow-servants, within the meaning of this rule."

Counsel for appellant, seizing upon this statement, insists that the

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judgment in the case at bar must be reversed on that ground, or the rule indicated in the case in 53 Ill. must be expressly overruled.

The decision of that case was undoubtedly correct, and does not, in any degree, militate against the views we have of this case ; but the language of the opinion used in commenting upon the instruction in question in that case was plainly too broad, and cannot be sustained without overruling the decisions of this court in very many cases. In fact, in that very opinion it is said : "It is, of course, not easy to define who are to be considered fellow-servants with such accuracy that doubtful cases will not occur." As applied to the facts of that case, the instruction in the *Murphy* case could lead to no false conclusion, but as a definition of what shall constitute fellow-servants in this class of cases, the language is plainly faulty.

If the law of this State be properly stated in that instruction, then, indeed, no action will lie for any injury in any case where the servant injured and the servant at fault were, at the time of the injury, each engaged in the ordinary duties of his service, no matter how widely removed may be their employments from each other. It is plain that if the injury did actually occur to one while in his ordinary employment, and from the negligence of the other while he was in his ordinary employment, the negligent conduct of the latter must necessarily have endangered the safety of the former. If the law be properly stated in that instruction, we ought to overrule the decisions of this court in *Shannon's* case, 43 Ill. 338, and in *Swett's* case, 45 id. 197, and in *Welch's* case, 52 id. 183, and in *Ryan's* case, 60 id. 171, and in *O'Connor's* case, 77 id. 391, and in other like cases. In all these cases, both the plaintiff and the man by whose negligence the injury was caused, at the time of the injury "were in the employment of the defendant, and their ordinary occupations in such service bore such relation to each other that the careless and negligent conduct of the servant at fault endangered the safety of the plaintiff." Otherwise he could not have been, in such case, injured in fact, and yet in all these cases it was held the action would lie. We are not prepared to overrule these decisions or depart from their teachings, and are, therefore, upon mature consideration, compelled to disapprove of what was said in the *Murphy* case about the instruction discussed in that opinion, although it seems afterward to have been referred to with approba-

tion in the case of *Valtez v. Ohio and Mississippi Railway Co.*, 85 Ill. 500.

What we have said is enough to dispose of this case, but the able, earnest and elaborate argument of counsel for the appellant seems to call for some further discussion. Recognizing that his position is not in accord with the decisions of this court in the cases referred to *supra*, wherein the common master has been held liable for damage done to one employee, by the negligence of another engaged in the same general enterprise, counsel for appellant presses upon our attention arguments and expressions of opinion found in our own reports in other cases where the master has been held exempt, which may seem incompatible with the rulings in the cases where the master has been held liable; and he supports his position by quotations from cases in English and American courts, which are certainly directly in point.

The decisions of courts of other States and the modern decisions of the English courts, though entitled to great consideration, are not binding authority in this State, and should have force here only in so far as the reasons upon which they rest may be found cogent and sound. And arguments and expressions of opinion found in our own reports, where they conflict with the decisions of this court, must always yield to the decisions.

It is no doubt true that many expressions found in the various opinions on this subject in our own reports, if read without reference to the facts under discussion, seem to be incapable of being reconciled; but it is equally true that a careful examination of the facts of the several cases in our reports, and an examination of the judgments pronounced in these same cases, will show remarkable harmony and uniformity in the decisions. Many of these decisions are not in harmony with the modern decisions in England, nor with the rulings in most of the States in this country; but it is believed they are founded in reason and are in harmony with each other.

Redfield, in his work on the Law of Railways, vol. 1, § 131, says: "It seems now perfectly well settled in England, and mostly in this country, that a servant who is injured by the negligence or misconduct of his fellow-servant can maintain no action against the master for such injury." This is undoubtedly true, but the courts do not all agree as to what is necessary to render employees of the same master "fellow-servants" within the meaning of this rule. The same author lays down what may be called the English doc-

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trine on this question to be, that "all the servants of the same master engaged in carrying forward the common enterprise, although in different departments widely separated, or strictly subordinated to others, are to be regarded as fellow-servants, bound by the terms of their employment to run the hazard of any negligence of any of the number, so far as it operates to their detriment." In other words, where the general object to be accomplished by the service of each is one and the same, the employer the same, the several servants deriving authority and compensation from the same source, all employees and agents, from the highest to the lowest, are regarded by the English rule as fellow-servants, no matter how remote from each other they may usually be occupied, or how distinct in character and nature may be their respective duties and employments. It is also true that this is the rule approved by the courts of last resort in most of the States in this country. We speak of this for convenience as the English rule, but in truth, its boundaries, as stated by Redfield, were first defined, in substance, by SHAW, Ch. J., in the case of *Furwell v. Railroad Co.*, 4 Metc. 49. And that case has very generally, and not improperly, been regarded, both in England and America, as the leading case in support of what we call the English rule. In this State this doctrine of exemption of the master has never been carried so far.

In several of the States this rule is subjected to limitations and is not carried to so great an extent. In this court, and in the courts of last resort in other States, the master has been held liable where the servant injured was in a subordinate position and the offending servant stood to the other as the representative of the master, and in other cases where the servants in question had no connection with each other in their service other than that of having a common master and of being engaged in a common enterprise.

The courts which maintain the English rule are not harmonious in their reasons for its support, and the courts wherein the rule is qualified by limitations do not agree, in all respects, as to the limitations to be placed upon the rule, nor do they agree entirely as to principles on which the rule is founded or by which the limitation should be controlled.

The exemption of the master from liability, in case of an injury of one of his servants by the neglect of another, is a rule comparatively new. Our attention has not been called to any mention of such a rule, or any allusion to it made in any reported case or by

any law writer, until it was asserted in the case of *Priestly v. Fowler*, 3 Mees. & Welsb. 1, which arose in the Court of Exchequer, in the year 1837. It was there said that no precedent could be found for an action by a servant against his master for damages caused by the neglect of his fellow-servant. In the 7th edition of Story on Agency, sec. 153*d*, it is said that this question "has not until recently become a subject of judicial examination." The history of this doctrine is given in that work, in that and other sections immediately succeeding that, and in the copious notes thereto found in that edition.

The rule of exemption of the master in such cases is very generally placed upon the ground of public policy, that is, upon what is thought best for the well being of society. In the very first case where the question arose, *Priestly v. Fowler*, *supra*, the decision is placed squarely on that ground. The second case on this subject, of which we have any account, is that of *Murray v. South Carolina Railroad Co.*, 1 McMullen, 385, decided in February, 1841. The case of *Priestly v. Fowler*, *supra*, evidently was then unknown to that court, for it is there said no precedent upon the subject can be found. The master was there held exempt from liability — by a divided court. The judges concurring in the judgment did not rest their judgment upon the same ground. What seems the ablest argument in favor of the judgment in that case, was made by Blanding. He says: "No man shall be liable for another's act except he has commanded it or has agreed to be so liable, or where such liability has been imposed on him by law, from principles of policy or for the public security," p. 391. And again: "If this (the public security) will be best promoted by making each person engaged in running the train risk all the injuries he may receive, without resort to his employer, then he should be excluded from such resort."

In Cooley on Torts, 541, it is said, "the rule is one of general public policy;" and again, that "in many employments the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove disastrous to life or limb." This is the current of the authorities, and we think the true ground upon which the propriety of the exemption of the master in any such case can be sustained. The history of this doctrine of exemption of the master, as well as the best reasoning of the cases, shows that what we have spoken of as a rule, (exempting the master in certain cases), is in fact but an exception

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or qualification of the ancient general rule of the common law, *respondet superior*, which, prior to the case of *Priestly v. Fowler*, *supra*, was laid down without qualification by all courts and common-law writers.

In Comyn's Digest (title "Master and Servant," K), it is said: "A master is liable for every act of his servant done by him in the course of his employment" (referring to 2 T. R. 154, where the rule is there stated in these very words).

In Viner's Abridgement ("Master and Servant," B 9), it is said: "If my servant doth any thing prejudicial to another, it shall bind me, * * * being about my business." Thus the law was formulated by Chief Justice HOLT in *Tuberville v. Stamp*, Comb. R. 459. In the syllabus of *McManus v. Cricket*, 1 East, 107, the law is formulated in the words: "A master is liable to answer for damage arising to another from the negligence or unskillfulness of his servant acting in his employment."

Blackstone, in his Commentaries, says: "If a servant by his negligence does damage to a stranger, the master shall be answerable for his neglect." 1 Bl. Com. 431. Paley, in his work on Agencies, published in 1811, says: "By the employment of an agent the employer becomes civilly responsible for his care and diligence to those who make use of him in his business." Paley on Agency, 294. And again (295), "A master is responsible for the negligence of his servant in the prosecution of his service," and the language of Chief Justice HOLT is quoted, where he says, "Where a trust is put in one person, and another, whose interest is intrusted to him, is damnified by the negligence of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified." 12 Mod. 490. Story, in the first edition of his work on Agency, published in 1839, says: "The master is always liable to third persons for * * * negligences * * * of his servants in all cases within the scope of his employment."

No limitation of this rule was ever anywhere suggested until this question arose of the liability of a master to his own servant for injury by the neglect of another.

In support of the English rule, it has since been suggested, inasmuch as Blackstone, in his statement of the rule *respondet superior*, speaks only of "damage to a stranger," that the rule by its terms does not embrace the case of damage to a servant, or, as it is said in one case, "this presupposes that the parties stand to each

other in the relation of strangers between whom there is no privity;" and then assuming that there is a privity of some sort between the injured servant and some one else in relation to the act causing the injury, it is insisted that the case of an injury of one servant by the fault of another in nowise comes within the meaning of the rule as formulated by Blackstone. *Farwell v. Railroad Co.*, 4 Metc. 49. In view of the words of older authorities, *supra*, this reasoning seems artificial and unsatisfactory. It is hardly to be supposed that Blackstone intended, by the introduction of the word "stranger," to state or lay down a limitation upon the rule *respondent superior*, as before that formulated in Comyn's Dig., 2 T. R., Viner's Abr., 1 East, or as expressed long before in *Tuberville v. Stamp*, Comb. R. 459, or to qualify the same in anyway whatever. If Blackstone had attached to the word "stranger," as used in that sentence, any special significance, it seems he would have given some explanation as to whom we should in that connection regard as strangers — some commentary on the departure from the language of the fathers in the common law. It is not to be believed that Paley or Story, who formulated the rule after Blackstone's day, intended to state the rule more broadly than was their understanding of the meaning Blackstone intended to convey by the words used by him. It seems almost certain that had Paley or Story understood Blackstone as stating the rule of *respondent superior* in a more limited sense than that of the earlier authorities, neither of them would have used the broad language of the older authorities without some comment on the language of Blackstone, and without assigning some reason for differing from a writer of such great authority. It seems more reasonable to infer, as we do, that Blackstone used the word stranger in the broad sense — meaning the same as if he had said, "damage to another," instead of "damage to a stranger." Kent so understood — for when he wrote, in 1827, he said of a master, "He is said to be liable, if the injury proceeds from the negligence or want of skill in the servant."

We are brought to the conclusion that the general rule of *respondent superior*, in its application to all cases arising before 1837, was applicable to all third persons falling within the true reason of the rule, and that the doctrine of the exemption of the master, in case of an injury of one fellow-servant by the fault of another, is really an exception to the rule.

If this be so, to determine what cases fall within the rule, and

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what cases do not fall within the rule, it seems to be wise to consider carefully the reasons on which the rule itself rests, and then to place such cases, and such cases only, on the list of exceptions as are not within the reasons on which the rule is founded.

The common-law rule — whereby the master is made to answer for damage done to others by the neglect of his servant — is plainly unjust, when applied to a case where the master has with due care employed a competent and careful servant, and is himself guilty of no wrong. As a mere matter of strict justice a man, who has himself done no wrong, ought not, as a mere matter of justice, to be compelled to answer for the negligence of another

The general rule, however, *respondeat superior*, although unjust as applied to the master in such cases as already shown, is as old as the common law, and is no doubt founded in wisdom. This rule, like many others, rests upon considerations of policy, upon the ground that the well-being of society is best promoted in that way. "In no other way could there be any safety to third persons dealing with principals through agents." Story on Agency, § 452. Cooley says, "the well-being of society is best subserved thereby." Ch. J. SHAW says, the rule *respondeat superior* "is adopted from general considerations of policy and security." *Farwell v. Railroad Co.*, 4 Metc. 49. And again, in the same case, "the rule is founded on the expediency of throwing the risk upon those who can best guard against it."

If this be so, the liability of the master must turn upon the proper consideration, in each class of cases, of what ruling will in fact throw the risk upon those who can best guard against it, of what is demanded to promote in the highest degree the well-being of society. The best interests of society demand that all business should at all times be so conducted that the least possible harm shall be caused thereby; that all servants, and especially all servants controlling dangerous instrumentalities, shall constantly use due care. The position that the well-being of society in early days demanded in such cases the rule *respondeat superior* was sustained upon the view then taken of the usual subordination of servants to the will of the master, and the usual devotion of the servant to the interests of the master. It seems to have been wisely thought that it would induce greater caution in servants to avoid injury to others, if servants knew that the master must answer for such injury; and also, that the responsibility of the master in such case would usually

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incite him to greater vigilance in promoting the desired constant caution in his servants. Where servants are habitually consociated in their daily duties (as most servants were at an early day in England), they may well be supposed to have an influence over each other, and a power to promote in each other caution, by their counsel, exhortation and example, at least equal to that of the master, and perhaps greater. In such case the well-being of society does not seem to demand that the master should be made to answer, in cases where he had done all that he ought to do, and the injury was to one such servant and from the negligence of another. The vigilance of such servants in such case may well be supposed to have a greater stimulant to constant exercise if each one knows that neither he nor his comrades can have any redress for injury to one by the negligence of the other. But where servants of a common master are not consociated in the discharge of their duties — where their employment does not require co-operation, and does not bring them together, or in such relations that they can exercise an influence upon each other promotive of proper caution — in such case, the reason of the rule holding the master responsible for damage resulting from the negligence of one of his servants seems reasonably to apply with as great force as if a stranger were the party injured. The influence of one servant upon another in the encouragement of caution cannot be relied upon in such case, for that can only operate where they are co-operating, or are brought together by their usual duties, or where there is habitual consociation. Then; indeed, in cases where they cannot be supposed to have in their power in any way to promote caution in each other, the well-being of society, if it is to have any such security, must depend entirely upon the vigilance of the master in promoting constant caution in each of his servants, and upon the desire of servants to protect the master from liability. Hence the master must in such case be held responsible for the neglect of his servant.

The application of these views, it is believed, will render it entirely practicable to maintain the rule adopted by this court, recognizing a distinction between the case of co-servants, whose duties are entirely distinct from each other, and are not such as to imply consociation or co-operation, and the case of co-servants consociated by means of their daily duties, or co-operating in the same department of duty or the same line of employment.

The line of argument, briefly stated, is this: The ancient com-

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mon-law rule, which holds a master (even in cases where he is guilty of no fault) responsible for the neglect of his servant, where a third person suffers damage from the negligence of such servant, rests entirely upon considerations of its practical effect upon society — upon considerations of policy ; and these considerations of policy rest upon the idea that the subordination of the servant to the will of the master and his devotion to the interests of the master give him under that rule, are incentives to caution he would not otherwise have, and upon the idea that the rule will incite the master to greater vigilance in the selection of prudent servants, and to greater zeal in the exercise of his influence over his servant to secure the exercise of care in all cases. When the reason of the rule ceases, the application of the rule ought also to cease, and especially is this true of a rule which rests not upon its own justice, but solely upon considerations of policy. Where servants of the same master are directly co-operating with each other in a particular business at the time of the injury, or are, by their usual duties, brought into habitual co-association, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice and encouragement and by reporting delinquencies to the master) in as great, and in most cases in a greater, degree than the master. If, then, each such servant knows that neither he nor his fellow-servant, if injured by the others' negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer. The same considerations of policy, which to avoid injuries to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants. But though servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually co-operating at the time of the injury in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation or example, or by reporting delinquencies to the master, and the well being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to

promote a constant exercise of due care by his servant ; and to bring these instrumentalities into action it becomes necessary (as in the case of an injury to a stranger) to adhere to the general rule that the master must answer for the neglect of his servant, and this, as already suggested, because the facts are such that society cannot, in such case, avail itself of the mutual power and influence of one servant upon another for want of the necessary opportunity for its exercise, and hence must depend for inducements to caution which are supposed to follow the general rule of the master's liability.

An examination of the decisions of this court upon this question will show that the judgments are all in full and strict accord with these views, and it is believed no case can be found in our own reports, where the common master has been held exempt from liability for injury to one servant by the neglect of another, where it does not appear that the servants were either strictly co-operating in the particular work they were about, or were usually consociated in their ordinary duties.

The first case in this court where this question received consideration was that of *Honner v. Illinois Central R. R. Co.*, 15 Ill. 550. The plaintiff was one of several servants of appellee engaged in adjusting a turn-table, when he was injured by the others so engaged with him. It was held he could not recover. Here they were strictly co-operating in the particular work they were about.

In *Illinois Central R. R. Co. v. Cox*, 21 Ill. 23, the servant injured was a laborer on a wood train, and the injury was the result of the negligence and want of vigilance on the part of the engineer and conductor running the train, and it was held no recovery could be had. Here, they were consociated in their ordinary duties. They usually worked together.

In *Chicago and Alton R. R. Co. v. Keefe*, 47 Ill. 108, the plaintiff was a laborer on a construction train, and was injured by the neglect of the engineer and conductor operating the train. It was held the action would not lie. Here, they usually worked together.

In *Murphy's* case, *supra*, the injury was to one of a "repair gang," working at a station or yard, and was caused by the negligence of the engineer of a switch engine which was constantly engaged at that yard, and by which cars were switched for repairs. 53 Ill. 336.

In *Gartland's* case, the injury was caused by the negligence of ser-

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vants engaged in moving cars, and was done to one of their number—strictly an associate. 67 Ill. 498.

In *Britz's* case, 72 Ill. 256, a laborer on a construction train was injured by the negligence of the conductor and brakeman of the same train. And in the case of *Troesch*, 68 Ill. 545, a conductor at a yard, who directed and assisted in making up trains, claimed to have been injured by the fault of the switch engine-driver engaged in making up the same trains, and they were held fellow-servants.

In *Keene's* case, 72 Ill. 512, the servant injured was a brakeman, and the fault was that of the engineer on the same train.

In *Durkin's* case, 76 Ill. 395, a laborer, or shoveller, on a gravel train was injured by the neglect of the engineer on the same train.

In the case of *Rush*, 84 Ill. 571, it was a brakeman, who was alleged to be injured by the default of the engineer operating the same train.

And in the case of *Vallez*, 85 Ill. 500, a car-repairer at a station or yard was injured by the negligence of the engine-driver of the switch engine used at the same yard.

It is insisted, in substance, that the reasons assigned in support of these decisions are such that they should govern in this case, and others in which this court has held the common employer liable.

Thus it was said: "There are certain perils incident to all employments, and which both parties have in view when the engagement is made," * * * and "which the employer does not undertake to insure against" (*Honner's* case, 15 Ill. 552); but in the same case it was said: "I would be far from saying that there may not be cases of carelessness * * * on the part of those to whom the corporation may intrust the management of its concerns, producing injury to the employees of the company for which it would be liable."

And in *Cox's* case, *supra*, it was said: "It is right and proper that one servant should not recover against the common master for the carelessness of his fellow-servant," etc. ; but the reason assigned was, "It is important to all concerned that each servant should have an interest in seeing that all his co-servants do their duty ;" and it is plain this reason can only apply in cases where the service of the one bears such relation to the other that such servants may have it in their power to exercise an influence to that end.

And in *Gartland's* case it was said: "By so entering into this employment" he "took upon himself the natural and ordinary risks and perils incident to the service in which he engaged, among which was the carelessness of his fellow-servants." 67 Ill. 498.

The same suggestion that the employee, by his contract of service, undertakes the hazard of the occasional negligence of fellow-servants who are generally careful, and that the employer does not warrant against such hazard, has been expressed in *Durkin's* case, 76 Ill. 395, and in *Valtez's* case, 85 id. 500, and perhaps in other cases. But it must be remembered that this contract thus spoken of is in no case supposed to be an express contract. It is an implied contract to which reference is made, and it must also be remembered that implied promises are mere fictions of the law whereby one is supposed to undertake to perform the duties imposed upon him by law. In *Kerr's Action at Law* (3d ed. by Smith), page 144, it is said, implied contracts arise "from this general implication and intendment of courts, that every man hath engaged to perform what his duty and justice require."

Chief Justice SHAW, in discussing the question whether the common master of fellow-servants rests under any implied promise to protect one against the negligence of the other, says: "In considering rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances."

When, therefore, it is said, in this connection, that a servant assumes, by entering the service of his master, any given hazard, it is merely another form of saying, that under all the circumstances, the law imposes that hazard upon him. Remembering, then, that in this State it is held that the law does not impose upon the servant the risk as to the neglect of all the servants of his master engaged in the same general enterprise, but confines that risk to cases where he and the offending servant are, in a proper sense, fellows, it will readily be perceived that these general words are to be understood as applying to the cases in which they are used — applying to cases where this court holds that the law does impose the

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hazard upon the servant. In other words, the servant, by engaging in the service, by an implied promise takes upon him all risks which the law imposes upon him, and no others ; and these are not improperly called "ordinary risks," and embrace the exceptional negligence of careful servants who are his fellow-servants within the law of this State, but do not embrace the acts of negligence of other servants of the same master who are not properly his fellows, although engaged in parts of the same general enterprise of the common master.

Accordingly, this court has in many cases held the master liable to the servant for damage caused by the neglect of another servant, although both were doing service contributing to the accomplishment of the same general enterprise.

In *Chicago and Alton R. R. Co. v. Shannon*, 43 Ill. 338, the injury was to a brakeman, from the bursting of a boiler, and the fault was the negligence of the foreman at the round-house in sending out an unsafe engine. The master was held liable.

In *Chicago and North-western Railroad Co. v. Swett*, 45 Ill. 197, the injury was to a fireman upon a locomotive and was caused by the negligence of the track-repairers, in not keeping a bridge or culvert in proper repair ; and the master was held responsible.

In *Schooner Norway v. Jensen*, 52 Ill. 373, the injury was to a sailor on the schooner, and was caused by the negligence of other servants of the same master, whose duty it was to see that the rigging and tackle of the vessel should not be sent out in bad order or in a defective condition. It was held, the action would lie.

In the case of *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183, the injury was to a brakeman on a passing train, and was caused by the negligence of other servants of the company, in placing an awning at the station in dangerous proximity to the operatives on passing trains ; and the action was sustained.

Where the injury was to a brakeman on a freight train, and was caused by the negligence of other servants of the same employer, having charge of the inspection and repair of cars, in permitting a car to go on the road with a defective ladder, which defect was unknown to the brakeman, the common master was held liable. *Chicago and North-western R. R. Co. v. Jackson*, 55 Ill. 492 ; s. c., 8 Am. Rep. 661.

Where the injury was to a fireman upon a passing train, and was caused by the negligence of other servants not connected with the

running of the train, in negligently placing a "mail catcher" too near to the track, it was held, the action would lie against the common master. *Chicago, Burlington and Quincy R. R. Co. v. Gregory*, 58 Ill. 272.

Where the injury was to a common laborer in a carpenter shop of a railroad company, near the railroad track, and the injury was caused by the negligence of the engineer in charge of a passing train of the same company, the common master was held liable. *Ryan v. Chicago and North-western R. R. Co.*, 60 Ill. 171 ; s. c., 14 Am. Rep. 32.

In the case of *Toledo, Peoria and Warsaw Ry. Co. v. Conroy*, 61 Ill. 162, although the action was defeated on another ground, the court indorse the proposition, that where the injury was to a fireman, from defects in a railroad bridge, unknown to him, and which ought to have been known to other servants of the same employer, and the injury came through the negligence of the latter, an action will lie ; and in this same case it was afterward so adjudged. 68 Ill. 560.

In *Chicago and North-western R. R. Co. v. Taylor*, 69 Ill. 461 ; s. c., 8 Am. Rep. 641, where the injury was to a station agent and switchman at a way-station, and was caused by the negligence of other servants of the company, whose duty it was to see that cars in passing trains should not go out upon the road without proper lights and proper brakes, the common master was held liable.

In *Illinois Central R. R. Co. v. Patterson*, 69 Ill. 650, it is laid down that an action will lie where the injury was to an engineer of a passing train, and was caused by the negligence of other servants of the common master, whose duty it was to see that the railroad track was in good order, although that action was defeated by the negligence of the servant who suffered the injury.

Where the injury was to a switchman at a station, and resulted from the negligence in the car-inspectors in permitting a caboose to go out on the road with a draw-bar which was too short, the common master was made to answer to the injured servant. *Toledo, Wabash and Western Ry. Co. v. Fredericks*, 71 Ill. 294.

And where the servant injured was one of a party of track-repairers, whose ordinary duties were not at the station, and the injury occurred by reason of the negligence of an extra engineer, whose duty was to take arriving engines to the round-house, and while the party injured was temporarily engaged, by the express

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orders of his foreman, in ditching the track at the station, this court said that the rule which forbids a recovery by a servant for an injury resulting from the negligence of a fellow-servant, did not apply. *Pittsburgh, Fort Wayne and Chicago Ry. Co. v. Powers*, 74 Ill. 341.

Where a brakeman upon a freight train was injured through the negligence of other servants of the common master, whose duty it was to send out no cars save those which was safe, so far as could be ascertained, the common master was held liable. *Toledo, Wabash and Western Ry. Co. v. Ingraham*, 77 Ill. 309.

In the case of *Toledo, Wabash and Western Ry. Co. v. O'Connor*, 77 Ill. 391, the servant injured was a laborer employed as a track-repairer, on a section away from the station, and at the time of the injury, was coming from his work, with his associates, over the main track, on a hand-car; and the injury was caused by the negligence of the engineer upon a passing locomotive, and this court held the common master liable.

So, where the injury was to an engineer by the explosion of his engine, it was held that the engineer cannot be regarded as a fellow-servant with the servants of the same master, whose duty was to inspect and keep in order its engines. *Toledo, Wabash and Western Ry. Co. v. Moore*, 77 Ill. 217.

So, where the injury was to an engineer operating a train on the railroad, and was caused by the negligence of the train-dispatcher, whose duty it was to regulate the movement of trains by telegraphic orders or otherwise, it was held that the common master was answerable. *Chicago, Burlington and Quincy R. R. Co. v. McLallen*, 84 Ill. 109.

It will be seen, by the cases cited, that in all the cases wherein the right of action has been denied upon the ground that the injured servant and the offending servant were fellow-servants, the facts show that they were brought into personal consociation by their ordinary duties, or that at the time of the injury they were actually co-operating in some particular work. And it also appears that in the cases where the action has been sustained no such relations existed. In the latter cases, this court has said, they were not employed "in the same department of labor," and that the one is "not in the same line of employment" with the other; and again, that they did not "co-operate in the performance of their duties." And in *Gregory's case, supra*, it is said that "one ser-

vant can recover from a common master for the negligence of a fellow-servant, unless the latter is in the same line of employment." And again: "The agents charged with that duty" (the duty of properly locating the mail catcher), "had no possible connection with running the trains." * * * "The duties were as different and as distinct as those of a conductor and those of a track-repairer." In another case, by way of showing that the relation of fellow-servants proper did not exist, it is said "neither could control the other or know of his want of prudence;" and again, they "are not associated in the performance of their duties." And in one case (*Ryan v. Railway Co.*, 60 Ill. 171), it is said that the reason for holding against a right of recovery in certain cases of co-servants, is, that for the safety of all each servant "in the same department of business should be interested in securing a faithful and prudent discharge of duty by his fellow-servants;" and that each should be induced "to report to the master any delinquency of those engaged with him in the performance of duty." This reason, it is said, "cannot apply where one servant is employed in a separate and disconnected branch of the business from that of another servant;" and again it is said "the object of the rule of exemption of the master is to make each servant vigilant in seeing that the others are careful and faithful;" and it is added, "where the reason of the rule fails the application of the rule should cease."

Although the distinction taken by this court between these two classes of co-servants has not the sanction of the courts of England, nor that of most of the courts of last resort in this country, we think on principle it is a distinction which ought to be taken, and which logically springs from the true reason (as already suggested) on which the common-law rule *respondeat superior*, rests, — upon the expediency of throwing the risk upon those who can best guard against the dangers.

Had these considerations been constantly kept in view, in all cases of injury to one of his servants by the fault of another, it is believed the exemption of the master in such cases would have been kept within reasonable bounds. If courts had constantly had an eye to casting the hazard on those who have the best means of preventing wrong, it is thought the exemption would have been applied to cases where the co-servants occupy such position in relation to each other as to suggest that they could, in some way, contribute toward guarding against the danger to be apprehended.

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This, however, being really a question as to what rule will best subserve the great interests of society, it is perhaps not surprising that courts of different States and different countries should have differed in their judgment as to what rule on this subject should govern.

The fact that no case can be found in the reports of judicial proceedings prior to 1837, in which a master was ever sued by his servant for damage done to him by the neglect of another of his servants, and the fact that the first case of the kind in England was decided against the action, and the fact that the first case of the kind in America (decided, evidently, before the report of the English case was known to the bar or bench in South Carolina) was also decided against the action (*Murray v. Railroad Co.*, 1 McMullen, 385) are very significant in showing that the action in cases of strictly fellow-servants ought not to be sustained. On the other hand, it is true that what is here denominated the English rule on this question has, in all its progress in the courts of England and America, encountered constant resistance by the bar and many of our ablest jurists; and that the reasons assigned in its support by the courts adopting it have been deemed inadequate and illogical, and have not been found in harmony with each other. These facts are significant in suggesting that that rule has not generally been placed on its true foundation, and has generally been carried too far. Upon the whole, we see no sufficient reason to depart from the rule indicated by the decisions in our own State, and cannot do so in this case.

The judgment in this case must be reversed, and the cause remanded for a new trial in consonance with the views herein expressed.

Judgment reversed.

SHELDON, J.. dissented on this point.

PRATT V. TRUSTEES OF BAPTIST SOCIETY OF ELGIN.

(93 Ill. 475.)

Subscription — death of subscriber before action on.

One who had executed his note to the trustees of a church, as a donation to enable them to buy a bell, died before the bell was ordered. *Held*, that the note could not be enforced although the bell was afterward ordered.

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ACTION on notes. The opinion states the case. The plaintiff had judgment below.

H. T. Gilbert and W. J. Brown, for appellant.

J. H. Mayborne, for appellees.

SCHOLFIELD, J. Appellees obtained judgment in the county court of Kane county against Mary L. Pratt, as administratrix of the estate of Philemon B. Pratt, deceased, on two promissory notes executed by the deceased to the appellees on the 6th of July, 1871, — one for \$300, payable one year after date, and the other for the sum of \$327.50, payable two years after date, and both bearing interest at the rate of ten per cent per annum. Appeal was taken from that judgment to the Circuit Court of Kane county, where the cause was again tried at its October term, 1876, resulting, as before, in a judgment in favor of appellees for the amount of the notes, principal and interest. Mary L. Pratt, administratrix, appeals from that judgment, and brings the rulings of the Circuit Court before us for review.

The defense interposed to the notes is, that they were executed without any valid consideration.

[Omitting an unimportant consideration.]

. The question to be considered is, did Pratt's death revoke the promise expressed in the notes, no money having been expended, or labor bestowed, or liability of any kind incurred, prior to his death, upon the faith of that promise?

The purpose in giving the notes was to enable the church represented by appellees to purchase a bell. The cost of a bell of a particular size, etc., was estimated by Pratt, and he gave his notes for the amount of the estimate, intending that when the notes were paid the money should be devoted to paying for such a bell, and when the notes matured, at Pratt's suggestion to let them stand, because, as he alleged, bell metal was getting cheaper, and they would thereby be enabled to procure a larger bell, no effort was made to collect the notes, and they were permitted to remain just as they were; but there was no undertaking on the part of appellees, nor the church which they represent, to procure a bell, and there is no proof of any act done, or liability incurred by appellees, or any one else, in reliance upon those notes, before the death of

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Pratt. It is shown that a bell has been procured, and probably there is evidence sufficient to show that this has been done on the faith of those notes, but it appears with reasonable certainty that this has been since Pratt's death. If a contract therefor was made in Pratt's life-time the record unfortunately does not show it. Collection of the notes cannot be enforced as a promise to make a gift. *Pope v. Dobson*, 58 Ill. 360 ; *Blanchard v. Williamson*, 70 id. 652.

Where notes are given by way of voluntary subscription, to raise a fund or promote an object, they are open to the defense of a want of consideration, unless money has been expended, or liabilities incurred, which, by a legal necessity, must cause loss or injury to the person so expending money, or incurring liability, if the notes are not paid. 1 Pars. on Bills and Notes, 202 ; 1 Pars. on Cont. 377, *et seq.*

And so it has been held that the payee of a promissory note given to him in the expectation of his performing service, but without any contract binding him to serve, cannot maintain an action upon it. *Hulse v. Hulse*, 17 C. B. 711 (84 Eng. Com. Law, 709).

In the absence of any one claiming rights as a *bona fide* assignee before maturity, it is not perceived that promissory notes, executed as these were, are, in any material respect, different from an ordinary subscription whereby the subscriber agrees under his hand, to pay so much in aid of a church, school, e'c., where there is no corresponding undertaking by the payee.

The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. *McClure v. Wilson*, 43 Ill. 356, and cases there cited ; *Trustees v. Garvey*, 53 id. 401 ; s. c., 5 Am. Rep. 51 ; *Baptist Education Soc. v. Carter*, 72 id. 247.

Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer, until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead

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man than a contract can, in the first instance, be made by a dead man.

If the payees named in the notes may be held agents of the promisor, with power to contract for work to be done and money expended upon the faith of the notes, the case of *Campinari v. Woodburn*, 15 C. B. 400 (80 Eng. Com. Law, 400), is directly in point, and holds that the death of the promisor was a revocation of the agency. In that case the plaintiff alleged that it was agreed between him and the defendant's intestate that he should endeavor to sell a certain picture, and that if he succeeded the intestate should pay him £100; that he did so endeavor while the testator was alive, and through the efforts then made was enabled to effect a sale after the testator's death, but that the defendant had refused to pay £100. The count was held not to show a cause of action. JERVIS, C. J., said that if the testator had countermanded the sale, he clearly would not have been liable for commissions, although the plaintiff might have recovered for services already rendered and charges and expenses previously incurred. *A fortiori* the defendant was not responsible when the revocation proceeded from the act of God.

An analogous case is *Michigan State Bank v. Leavenworth*, 2 Williams (Vt.), 209, where it was held that the operation of a letter of credit was confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death.

The question has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.

We are of opinion, on the record before us, the judgment below was unauthorized. It must therefore be reversed and the cause remanded.

Judgment reversed.

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BOSCOWITZ V. ADAMS EXPRESS COMPANY.

(93 Ill. 523.)

Carrier—contract for limitation of liability—receipt—negligence of third party.

The plaintiff's agent delivered three bales of furs to the defendant, a common carrier, for transportation. At the same time he filled up and delivered to the defendant a printed blank receipt, such as was used by the United States Express Company, with their name on it, and containing a condition that the United States Express Company would not be liable for loss or damage except as forwarders, nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value was stated in the receipt. The plaintiff's agent wrote the word "Adams" over the printed words "United States" in the receipt, and drew a pen through the blank left for the statement of valuation, but left it otherwise unchanged, and the defendant signed and delivered it. The goods were destroyed by fire on the railway train employed by defendant, caused by the wreck of the train by a broken rail. In an action for the value of the goods, *held*, (1) that the receipt did not constitute the contract; (2) that the limitation, if applicable, applied to each bale separately and not to the three as one shipment; (3) that evidence was admissible to show an oral agreement by the defendant to carry the plaintiff's goods at non-valuation rates; (4) that notwithstanding any limitation of liability the defendant was liable for the full value if the loss was the fault of the railroad company.

ACTION for value of goods delivered for transportation. The opinion states the case. The plaintiff had judgment below.

Sidney Smith and John C. Patterson, for appellants.

Small & Moore, for appellee.

SCOTT, J. Plaintiffs brought their action against the Adams Express Company to recover the value of three bales of furs delivered to the company for transportation from Chicago to New York. The goods were never delivered to the consignees, but were destroyed *en route* by fire caused by the wreck of the train, occasioned by a broken rail.

As to the delivery of the goods to the carrier, their value and destruction by fire, there is no disagreement. The receipt taken by the shippers at the time of the delivery of the goods to the car-

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rier was filled up by an employee of plaintiffs, and was presented with the goods for the signature of the agent acting on behalf of the company. The blank used for that purpose was one of a large number furnished by the United States Express Company to its customers. In the receipt prepared by the book-keeper of plaintiffs for the goods to be shipped, the word "Adams" is written over the printed words "United States," so as to make it the receipt of the Adams Express Company. A line made with a pen was drawn over the blank left for stating the valuation of the goods. The articles mentioned in the body of the receipt are "three (3) bales, said to contain peltries." On the upper left-hand corner of the receipt is stated in figures the separate and total weights of the three bales, and also "two bales mink" and "one bale skunk;" but there is a conflict in the testimony as to when these latter words and figures were placed there—whether before or after it was signed by the agent of the company.

Among the printed conditions of the receipt is the following: "And it is hereby expressly agreed that the said United States Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is hercin stated." The contention is, whether this clause of the receipt limits the right of recovery, in case of the loss of the goods, to the sum of \$50, because the true value was not stated therein, or whether plaintiffs, notwithstanding the restriction as to the extent of the carrier's liability, can recover the full value of the goods as shown by the evidence. Plaintiffs base their right to recover on two propositions: first, under the facts of the case it was not their duty to make known to the carrier the valuation of the goods; and second, even if it was their duty, the omission to make such disclosure cannot be urged to limit a recovery for a loss of goods caused by the carrier's own negligence. On the other hand, defendant rested the defense upon the letter of the contract, relying upon what it understood to be a rule of law applicable to the case, that it was incompetent for plaintiffs to contradict or vary the terms of the contract as embodied in the receipt given by the carrier for the goods.

Upon the questions involved the court instructed, for defendant, that the issues submitted were, whether the furs were lost or destroyed by reason of actual negligence of defendant, and if no

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negligence is proved, then, if the goods, while in the course of transportation, were destroyed by an unforeseen casualty, against which ordinary prudence could not provide, it was the duty of the jury to assess no greater damages than \$50 — the sum stated in the limitation clause of the contract,—and that the receipt in evidence must be regarded and treated as a binding contract between the parties in each and all of its provisions, and that it should be read as though the words “United States” were not in it. The court, however, refused to give for plaintiffs the reverse proposition, as it was asked to do, that the conditions and restrictions contained in the receipt were not binding upon plaintiffs, so far as they purported to limit the carrier’s common-law liability, unless plaintiffs had knowledge of such restrictions and assented to them. Under the charges given, the jury, no doubt, felt compelled to assess plaintiffs’ damages at no greater sum than \$50 — which they did.

As we have seen, the goods destroyed consisted of two bales of fine, and one of coarse, furs—all distinct packages—and each proven to be of a value in excess of the sum named in the restricting clause of the receipt. It will be observed the limitation is as to “any box, package or thing;” and as each package or bale exceeded in value \$50, there is and can be no reason why, in any view that may be taken of the legal effect of the alleged contract, plaintiffs cannot recover that sum for each “package” destroyed. It makes no difference the several distinct packages were all embraced in one receipt — they are, nevertheless, distinct packages. In limiting the amount of recovery, in case no negligence was proven, to \$50, as was done by the court in its instructions, there was manifest error, for which the present judgment must be reversed, even if no other cause existed.

The question of the most importance in the case is, whether, as a matter of law, the receipt in evidence is to be treated as a binding contract between the parties in each and all its provisions.

Construing the receipt literally, it contains no contract between the shippers and defendant that in any manner limits the carrier’s common-law liability as to the amount of the recovery in case of the loss of the goods. That which is said to constitute such contract is contained in the printed part of the receipt, and is with the “United States” Express Company, and not with defendant. A case bearing a close analogy to this one in this particular is the *Merchants’ Trans. Co. v. Bolles*, 80 Ill. 473, where the receipt given

for the goods contained exemptions in favor of other companies, and it was ruled, the carrier receiving the goods could not take the benefit of such exemptions in the receipt. It is a proposition so plain it will not be controverted, that defendant can claim no exemption from liability for the loss of the goods as a common carrier, except such as given by express contract. Neither in the written nor printed part of the receipt is there any express contract making exemptions in favor of the defendant company. Before defendant can claim the benefit of the exemptions contained in the contract with the "United States Express Company," it must appear it was the agreement of the parties, and that can only be shown by evidence. In the absence of evidence establishing that fact it was error for the court to declare, as it did, as a matter of law, that the receipt given for the goods was to be read as if the words "United States" were not in it.

The other proposition stated, viz.: the receipt must be regarded as a binding contract between the parties, in each and all its provisions," is the one most discussed. The rule of law adopted and uniformly adhered to in this State is, that a clause in a receipt given to the shipper of goods limiting and restricting the carrier's common-law liability incident to its general employment, if understandingly assented to by the owner, will as effectually bind him as though he had signed it. Whether such restrictions have been assented to in any given case is always a matter of evidence. The cases in this court that declare this doctrine are referred to in *Erie Railway Co. v. Wilcox*, 84 Ill. 239; s. c., 25 Am. Rep. 451, and it is not necessary to repeat the citations. Where a carrier seeks exemptions from any common-law liability annexed to its employment, the contract must be assented to by the shipper with a view to release the duties imposed; and when the exemption is once established, the carrier, in case of loss, will only be responsible on account of negligence or willful misconduct. The law has wisely, and for reasons that concern public interests, inhibited a common carrier of passengers or freights from contracting against its own negligence, and notwithstanding it may be so expressed in positive terms in the release, it is not to be read as providing against losses or injuries arising from actual negligence. No argument is made against the correctness of this proposition of law, but its applicability to the case at bar is denied, for the reason it is said the receipt containing the exemptions insisted upon was prepared by the

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owners of the goods, ready for the signature of the agent of the defendant, and they must be held to be conclusively bound by its provisions ; and the court, as we have seen, charged that as a matter of law, the receipt was a " binding contract between the parties in each and all its provisions."

The case of *Oppenheimer v. United States Express Co.*, 69 Ill. 62 ; s. c., 18 Am. Rep. 596, is cited as giving sanction to the view of the law taken by the court below. That is a misapprehension of what was decided in that case. While that case declares salutary rules designed to secure good faith between the shipper and the carrier, it does not go to the extent counsel seem to understand it. We do not wish to be understood as departing in any degree from the law declared to be applicable to the facts of that case. The principle there announced is, that where the carrier seeks to be discharged from the duties which the law has annexed to its employment, notice alone will not be sufficient without the assent of the skipper to the attempted restrictions ; but it is otherwise in respect to those duties designed simply to enjoin good faith and fair dealing—a notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient.

It will be seen there is in that case no departure from the uniform decisions of this court, that a carrier cannot be released from the duties and liabilities annexed to its employment, unless the shipper assents to the attempted restrictions. That is apparent from the fact it is said, in the beginning of the case, " the denial in the testimony that the consignors had knowledge of this condition in the receipt must be held to be overcome by the circumstances of the case." The condition to which reference is made is the limitation clause as to the amount of recovery in case of loss, where no valuation of the goods is stated. On looking into the facts of the case, the conclusion was fully warranted. There was in that case what is justly characterized as " unfair conduct on the part of the shippers of the goods." The box containing the goods was a small one, and had nothing on it that indicated what it contained. It was called for by the driver who collects goods for the company, and receipted for as " one case," but no information was given in any manner as to its contents or value. The receipt given was prepared by the owner of the goods, and was signed by the driver when he called for the package. The box, in fact, contained watches and jewelry of great value, and had the shippers disclosed the contents

or value, increased charges would have been exacted over the sum actually paid. There is no analogy between the facts of that case and the one at bar.

The goods in this case were so put up that their nature and character were readily discoverable on the slightest examination, and were receipted for as "three bales, said to contain peltries." If the testimony given can be credited, the weights and qualities of each bale were indicated on the margin of the receipt as consisting of two bales mink and one skunk furs. It is a matter of common information that mink is among the fine furs taken in this country, and that fact must have been known to the agent of defendant when he received the goods for carriage. There was, therefore, no imposition practiced upon the carrier as to the character of the goods delivered for shipment, and it cannot be said the owners omitted any duty imposed by law to insure fair dealing between the carrier and the shipper, unless it was the failure to make known the actual value of the goods. That fact, notwithstanding the provisions of the receipt, we think is open to explanation. Plaintiffs offered to prove that defendant had, through its local agents, solicited the patronage of plaintiffs, on the same terms that other companies had it—that is, that such goods as plaintiffs were known to be constantly shipping should be taken on non-valuation rates; but the court ruled it was not competent evidence. Conceding the testimony offered was true, and for the purposes of this decision it must be regarded as true, it was most important evidence tending to show why no valuation was stated. If not required to do so by express contract with defendant, or by the uniform course of business with defendant and other carriers, then plaintiffs were not bound, in the first instance, unless inquired of concerning the actual value of the goods, to state any valuation.

The testimony excluded was important for another reason, as tending to show why neither party paid any attention to the limitation clause contained in the receipt taken for the goods. On the understanding such goods as plaintiffs were shipping were to be and had been received and carried at non-valuation rates, neither party was interested to consider the limitation clause, and that may have been the reason why plaintiffs failed to erase it, or the company to insert its own name instead of the "United States Express Company," that it might have an express agreement with plaintiffs. It is evidence, to say the least of it, that tends to show that neither

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party attached any importance to that clause in the receipt. Unless the limitation clause was assented to by the shippers with a view to release defendant from that liability which the law annexes to its employment, defendant cannot avail of it, and that which counsel maintain as a conclusion of law is nothing more than the effect to be produced by the testimony offered to establish the fact insisted upon. As in the former cases in this court, it was a question whether the circumstances in evidence overcame the denials in the testimony that the consignors had knowledge and therefore assented to the limitations contained in the receipt, so in this case the same question arises, and ought to be submitted to the consideration of a jury as any other fact in the case. On this branch of the case the testimony excluded was important and it was error to reject it. The same question arose in *Field v. Chicago and Rock Island Railroad Co.*, 71 Ill. 458. In that case the bill of lading was filled out by the clerk of plaintiff, and as the court found the shippers had notice of the contents and assented to the restrictions therein contained, therefore the receipt or bill of lading was the contract between the parties. It is not understood there has been any departure from the doctrine of that case. That the fact the owner of the goods, by himself or clerk, filled up the receipt taken, is evidence tending to show the shippers had notice of the conditions and must have assented to them, may be true, but it is not conclusive. It is still a question of fact. Sometimes such evidence may produce conviction, and justly so, as in *Field's* case, but cases may arise where the acts of the party may be susceptible of satisfactory explanation.

But admitting the conditions in the receipt were understandingly assented to by the shippers and became a binding contract between the parties, still defendant would be liable for the full value of the goods if the loss was owing to negligence on the part of the railroad company. An express company choosing such a corporation to do its business will be chargeable to the same extent for the negligence of the agent employed as if the contract was primarily with such agent, on the well-recognized principle that for culpable defects in carriages used by common carriers the law makes the carrier responsible.

The fourth charge, given by the court at the instance of defendant, declares the law on this subject, but the court excluded from the jury testimony that had an important bearing on the decision.

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There was evidence tending to show the fire was caused by the telescoping of the cars, and although the testimony was conflicting, still there was sufficient to warrant the court in submitting that fact to the jury. Bearing directly on this important fact in the case was the testimony offered as to the efficiency of the "Miller platform" to prevent what is called telescoping of cars. Witnesses of large experience in such matters state that the "Miller platform" is regarded as adding "largely to the safety of trains," and the use of them tends to prevent breaking in the ends of the cars. One witness says he had "known the end of cars to be badly broken in collisions when they had the 'Miller platform,' but never knew one car run into another." What is known as the "Miller platform," and others equally as good, designed by other parties, was generally known and had been in use on all the principal roads in the country long before the happening of the accident by which the plaintiff's goods were destroyed, and if such contrivances contributed materially to the safety of trains, it was the plain duty of the railroad company to have adopted some one of them, and the omission to do so, if such was the case, would be negligence. All the evidence offered as to the Miller or other equivalent platforms was excluded from the jury, and this we think was error.

It may be true, as counsel insist, that no witness testified to the kind of platform in use by the railroad company employed by defendant, or that it did not have an equivalent device or an equally safe platform. But it was proven the railroad did not have the "Miller platform" and plaintiffs offered to prove it used the "ordinary or old-fashioned platform." The objection of defendant to the giving of that testimony was sustained. Had the testimony offered as to the kind of platform in fact used by the railroad company been admitted, it would, with that excluded by the court, have made the question whether the fire that destroyed plaintiff's goods was owing to the want of the "Miller platform" or other equivalent device to prevent telescoping of the cars. It is a question of fact, and ought to have been submitted to the jury as any other fact in the case.

For the errors indicated the judgment will be reversed and the cause remanded.

Judgment reversed.

SHELDON, J., dissenting.

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WRAGG V. PENN TOWNSHIP.

(94 Ill. 11.)

Criminal law — double punishment — repeal of statute.

Where an obstruction of a highway is declared by statute to be an indictable nuisance, and was previously punishable by a penal suit in the name of the town, a judgment under the statute is not a bar to a proceeding under the other,* and the provision for such penal suit is not repealed by the provision for indictment.

SUIT for a penalty for obstructing a highway. The opinion states the facts. The plaintiff had judgment below

J. E. Bush, John E. Decker and C. C. Wilson, for appellant.

Miles A. Fuller, for appellee.

DICKBY, J. This action was originally brought before a justice of the peace, by the town of Penn, in Stark county, against Samuel Wragg and Edwin Holmes, to recover a penalty for the obstruction of a public highway, and was taken by appeal to the Circuit Court of that county.

Judgment was rendered by the court against the defendants, to reverse which an appeal was taken to this court.

The penalty is sought to be recovered under section 58, chapter 121, Revised Statutes of 1874, which is as follows:

“If any person shall injure or obstruct a public road by felling a tree or trees in, upon or across the same, or by placing or leaving any other obstruction thereon, or by encroaching upon the same with any fence, or by plowing or digging any ditch or other opening thereon, or by turning a current of water so as to saturate or wash the same, or shall leave the cuttings of any hedge thereon for more than five days, shall forfeit for every such offense a sum not less than \$3 nor more than \$10; and in case of placing any obstruction on the highway, an additional sum of not exceeding \$3 per day for every day he shall suffer such obstruction to remain after he has been ordered to remove the same by any of the commissioners of highways, complaint to be made by any person feeling himself ag-

*To same effect, *Greenwood v. State* (6 Baxt. 567), 32 Am. Rep. 530.

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grieved; *provided*, this section shall not apply to any person who shall lawfully fell any tree for use and will immediately remove the same out of the road, nor to any person through whose land a public road may pass who shall desire to drain his land and shall give due notice to the commissioners of such intention; and provided further, that any commissioners or overseers of highways, after having given reasonable notice (to the owners) of the obstruction, or person so obstructing or plowing or digging ditches upon such road, may remove any such fence or other obstruction, fill up any such ditch or excavation, and recover the necessary cost of such removal from such owner or other person obstructing such road aforesaid, to be collected by said commissioners before any justice of the peace having jurisdiction."

Section 60 of the same chapter provides that the suit shall be in the name of the town in which the offense is committed, and section 61 of the same chapter provides that all fines recovered shall be paid to the commissioners of highways of the town, to be expended upon the roads and bridges in the town.

It appears from the record that the road or public highway in question was established by the commissioners of highways of the town of Penn on June 4th, 1866; that the road as thus established covered certain parts of the lands of each of the appellants; that near the land of the appellant Wragg a pond or slough was situated in the road, which was impassable, except when the pond was frozen in winter or dried up in a dry season; and that at other times persons going along on the road were compelled to leave the line of the road and make a circuit of about twenty rods on the land of another party in order to get around the pond and back again on the road.

It further appears that the appellant Holmes, at the time the road was established, had a fence across the line of the road at the south line of his land, which was supplied with bars, through which persons travelling along the road passed. This fence was not removed immediately after the establishment of the highway, but according to the testimony of the majority of the witnesses testifying to that point, was removed before 1869, but not by the commissioners of highways. No fence was erected in its place until about the 20th of September, 1876, when a four-board fence was erected by the appellants at that point across the entire width of the road, with the

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avowed purpose on their part of obstructing the road and preventing the use thereof.

It further appears, that in 1869, the appellant Wragg built two fences on his land down to and upon and across the road, which remained there until May 29, 1871, when they were removed by the commissioners of highways after having given him more than sixty days' notice to remove the same.

While these fences were standing travel was impeded but not wholly prevented on the road, for persons wishing to pass went around the fences on the land of another party and regained the road beyond. When the fences were removed there was no obstruction to travel for the entire length of the road as established by the commissioners of highways, except the inconvenience of getting around the pond near Wragg's land; and the road had been used for travel before his fences were erected in 1869.

It further appears that the appellants, after the road was established in 1866, set back their hedges along the road so as to conform to the line of the road as established.

On October 23, 1876, notices in writing were served on appellants by the commissioners of highways to remove the obstruction which they had erected in the highway at the south line of Holmes' land, which they refused to do. The evidence shows that the fence is still standing. Summons was issued on Nov. 3, 1876.

The appellants contend that section 58 of chapter 121, under which the suit is brought, has been repealed by section 221 of the Criminal Code (chapter 38, Rev. Stat. of 1874), which was subsequently enacted, and which provides that it is a public nuisance to obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places and ways to burying places. Section 222 of the same chapter provides, that "whoever causes, erects or continues any such nuisance shall, for the first offense, be fined not exceeding \$100, and for a subsequent offense shall be fined in a like amount and confined in the county jail not exceeding three months. Every such nuisance, when a conviction therefor is had in a court of record, may, by order of the court before which the conviction is had, be abated by the sheriff or other proper officer, at the expense of the defendant; and it shall be no defense to any proceeding under this section that the nuisance is erected or continued by virtue or permission of any law of this State.

The act of obstructing a highway is declared by the Criminal

Code to be a nuisance punishable by indictment, and the same act, under section 58 of chapter 121, is made punishable by suit in the name of the town to recover a penalty. The two statutes apply to the same act, and affix different penalties, and provide different modes of procedure for the punishment of their violation.

The appellants contend that inasmuch as the act prohibited in each statute is the same, the offense is single, and only one penalty or punishment can be attached to one offense. And that the act declaring the obstructing of a highway a nuisance punishable by indictment, having been enacted after the one which made the obstructing of a highway punishable by suit to recover a penalty, the former law has been repealed by implication as being repugnant to and inconsistent with the last expression of the law-making power.

Repeals by implication are not favored by the courts, and unless the two statutes cannot be reconciled they must be allowed to stand.

The question presented for decision is not free from difficulty. The theory of appellants' counsel is, that a criminal act is necessarily but one offense and may be punished in one way only, and that the party cannot twice be put in jeopardy for the same act. But this is clearly not the law.

In the case of *Fox v. State of Ohio*, 5 How. 432, the Supreme Court of the United States held, that passing a counterfeit coin which was punishable under Federal law might also be punished by the State as a crime; that the same act was an offense against the Federal government and against the State government, and that the State law prescribing a punishment for the crime was not repugnant to the Constitution, and that although the party might be convicted for violating both statutes, still he would not be twice put in jeopardy for the same offense.

Mr. Justice McLEAN, in delivering a dissenting opinion, used the following language: "Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization." But he stood alone in his dissent from the opinion of the court. The doctrine was afterward held sound in the case of *Moore v. People*, 14 How. 13.

In delivering the opinion in this last-mentioned case, Mr. Justice GRIER says: "An offense, in its legal signification, means the trans-

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gression of a law. A man may be compelled to make reparation in damages to the injured party and be liable also to punishment for a breach of the peace in consequence of the same act, and may be said in common parlance to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of both. That either or both may, if they see fit, punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other." And this is the settled law as laid down by the Supreme Court of the United States.

The rule prevails where the act is punished in two or more ways by the same sovereign. An assault committed in the presence of a court may be punished in two ways, first, for contempt of the court, and again in a criminal prosecution for the assault.

In *Freeland v. People*, 16 Ill. 383, this court say: "It is not enough that the act is the same, for by the same act the party may commit several offenses in law. In the same act of feloniously taking a quantity of goods, the party may, in law, be guilty of as many crimes as there are separate owners of the goods stolen, and may be punished as for so many distinct larcenies."

In *Gardner v. People*, 20 Ill. 434, this court say: "An act may at the same time be an offense against the United States government and also against a State government. The same act may also constitute several crimes or misdemeanors, and the trial and punishment for one will be no bar to a prosecution of another growing out of the same act."

The question in this State has frequently arisen in prosecutions under the ordinances of cities and under the general criminal law of the State, both of which, in some instances, prohibit and punish the same act. The general law and the ordinance are, in effect, both acts of the legislature. City ordinances passed under the delegated power conferred in the city charter have the force, as to persons bound thereby, of laws passed by the legislature of the State.

"A city council is a miniature general assembly, and their authorized ordinances have the force of laws passed by the legislature of the State." *Taylor v. Carondelet*, 22 Mo. 105.

The legislative power of cities is but a part of the legislative power of the State, and whatever law the legislature may enact through the intervention or agency of a municipal corporation, it can enact by itself without such intervention. The legislature cannot authorize a city to declare an act a crime which the legislature is prohibited from declaring a crime. And if the legislature has power to make an act punishable in one way under the general laws of the State, and the same act also punishable in a different way under the authorized ordinances of a municipal corporation, the legislature may, if such is its intent, make the same act punishable in different ways under general laws of the State.

There does not appear to be any prohibition on the power of the legislature to declare that the commission of a particular act shall constitute two or more offenses, each of a different grade of criminality and punishable in a different manner.

The question most frequently raised is, whether the legislature intended to make an act a double offense, and not as to the existence of the power.

Cooley on Constitutional Limitations, 199, avers that the same act may constitute an offense both against the State and the municipal corporation, and both may punish it without violation of any constitutional principle. Grant on Corporations, 82, states that the same rule prevails in England.

Bishop on Statutory Crimes, book 1, ch. 2, § 23, lays down the rule thus: "If the statute so authorizes, it is not apparent why a city corporation may not impose a special penalty for an act done against it, while the State imposes also a penalty for the same act done against the State."

The decisions on this subject by the courts of the several States are apparently in hopeless conflict with each other. Dillon on Municipal Corporations, § 301, says: "Hence the same act comes to be forbidden by a general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. * * * But can the same act be twice punished,—once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offense, one against the State and one against the corporation. Others regard the same act as constituting a single offense, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction."

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In Georgia and Louisiana it is held that a municipal corporation has no power to enact an ordinance touching an offense punishable under the general law of the State. 21 Ga. 80.

In *Rice v. State*, 3 Kans. 141, the court say: "It is not necessary in this case to decide whether both the State and the city can punish for the same act; but we have no doubt that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power."

In Missouri the rule is clearly announced that the same act can be punished but once, and that a conviction under a city ordinance may be pleaded in bar to an indictment under the State law. *State v. Cowan*, 29 Mo. 330.

In Alabama the rule is the other way, and it is held that the same act may be punished under a city ordinance, and at the same time under the general law. 14 Ala. 400.

In Indiana the rule used to be the same as it is now in Missouri, but in *Ambrose v. State*, 6 Ind. 351, it was modified, and the court there held that a single act might constitute two offenses, one against the State and one against the municipal government. And in *Waldo v. Wallace*, 12 Ind. 582, it was held "that each might punish in its own mode by its own officers the same act as an offense against each."

In Illinois this court, in the case of *Bennett v. People*, 30 Ill. 389, held that the legislature might grant to a municipal corporation the exclusive authority of regulating the sale of liquor within its limits, and that where such municipality had exercised such authority by passing restraining and regulating ordinances, a person could not be convicted under an indictment for violating the State law on that subject, but was amenable only to the ordinances.

The case of *Gardner v. People*, 20 Ill. 430, was an indictment under the State law, for selling liquor without a license, and it was argued that because the legislature had conferred upon the city of Monmouth power to license, regulate and prohibit the sale of liquors in the city limits, the State law on that subject was repealed by implication. But the court held that the power conferred upon the city was not exclusive, and that the legislature did not, by merely giving the city the right to act, repeal the general law of the State on the subject; and the court expressly declined to decide whether the law and the ordinance could both be enforced by a punishment under each.

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In the case of *Berry v. People*, 36 Ill. 423, this court went further, and held that where the charter of the city of Belleville conferred authority, but not exclusive authority, on the city to suppress and restrain gambling, the city ordinance passed on that subject and the State law were concurrent, and that a judgment recovered under the ordinance would bar a recovery by the State for the same cause.

But later, in the case of *Fant v. People*, 45 Ill. 259, the court recedes from the position assumed in *Berry v. People*, and expressly declines to decide that the jurisdiction is concurrent, and whether both the ordinance and the State law can be enforced together: "Even if the jurisdiction should be held to be concurrent, and that the exercise of the power by the city was cumulative, the State first acquired jurisdiction, and there being no pretense that plaintiff in error had been proceeded against under the city ordinance, it can therefore be no defense that he had been liable to prosecution under the ordinances. Had he been convicted under the ordinance for this offense, then a very different question would have been presented. But that question is not now before us for determination, and we deem it unnecessary to discuss it."

The court, in that case, left the question in about the attitude in which it was placed by *Gardner v. People*, 20 Ill. 434, and it cannot be said that the law is settled by this court, for the fair construction of the opinion in *Fant v. People* is, that a city ordinance on the same subject as a general law, both imposing penalties for the same act, neither repeals the law nor is it repugnant thereto; but that the ordinance and the law are either separate provisions (both capable of being enforced), or concurrent remedies (only one of which may be enforced), and the court fails to determine whether they are separate or concurrent.

We think there is no doubt but that it is within the power of the legislature to create two or more offenses which may be committed by a single act, each of which is punishable by itself. A conviction or acquittal in such case under either statute would be no bar to a conviction under the other, for the accused would not be twice in jeopardy for one offense, but only once in jeopardy for each offense.

Assuming the power of the legislature to be as above stated, in what light do the two sections under consideration stand to each other? Section 58, chapter 121, Revised Statutes of 1874, was intended to furnish to every town of the State a remedy for obstruct-

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ing the highways in the town. It is a matter of importance to the town to have its highways free from obstructions, and a damage to it and its inhabitants in case its highways are obstructed, entailing upon the town expense and inconvenience. But the town and its inhabitants are not alone interested in its highways; the people of the State are also interested in the highways, although that interest is not of a directly pecuniary character.

Can it be said that the legislature may not protect the rights of the public in the highways of the State, by punishing infringements of those rights by individuals, without repealing the remedy for the injury sustained by the town in which the act is committed? The laws, as they stand, give to the town a right of action to recover by suit a penalty or fine in the nature of compensation for an obstruction of a highway in the town, the penalty, when collected, to be expended upon the roads and bridges in the town where the offense was committed; and for an obstruction of a highway an indictment for a nuisance may be had to punish the injury to the State and the public at large, by fine for the first offense, and for a subsequent offense by fine and imprisonment. The two laws are passed, in fact, upon different subjects and distinct injuries, one is intended to deal with the consequences of the act upon the town, and the other with the consequences of the same act upon the State. The injury is double, and the punishment may be double. There is no repugnance or inconsistency between the two provisions, and, in our opinion, both may stand and be enforced independently and without interference with each other.

For the reasons above stated, we hold the action was properly brought under section 58 of chapter 121, Revised Statutes of 1874, and that the motion to dismiss for want of jurisdiction was properly denied.

[But on another point]

Judgment reversed.

IRVIN v. NEW ORLEANS, ST. LOUIS AND CHICAGO RAILROAD
COMPANY.

(94 Ill. 105.)

Taxation — personal property — place of.

A transfer boat, registered at Cairo, Illinois, plying between that place and Fillmore, Kentucky, on the opposite shore of the Ohio river, and owned half by a railway corporation of Illinois and half by a railway corporation of another State, and used for the transfer of cars of both companies, laid up at Cairo when not in use, both companies having a business office there and the boat hands residing there, is properly taxed there to both corporations.*

THE opinion states the case.

Linegar & Lansden, for plaintiff in error. A vessel is taxable at its situs which is her home port, and we ascertain what her home port is by finding at what port the vessel is enrolled or registered, the residence of her owner or owners, the places where she lies up, the residence of her officers. § 4141 Rev. Stat. of the United States, and § 4178; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 id. 471; *Wiley v. City of Pekin*, 19 Ill. 160; *City of New Albany v. Meekin*, 3 Ind. 481; Burroughs on Taxation, § 46. As to the taxation of personal property situate in a district, town, county or State other than that in which the owner resides. *Mills v. Thornton*, 26 Ill. 300; *Board of Supervisors v. Davenport*, 40 id. 197-209; *Dunleith v. Reynolds*, 53 id. 45; *First National Bank v. Smith*, 65 id. 44-54; *Hoyt v. Comrs. of Taxes*, 23 N. Y. 224; *The People v. Comrs. of Taxes*, 35 id. 423-440; *St. Louis v. Ferry Co.*, 40 Mo. 580; *Alvany v. Powell*, 2 Jones' Eq. (N. C.) 51. *

Green & Gilbert, for defendant in error. A corporation actually and permanently resides within the State by whose law it is created. *Ins. Co. v. Frances*, 11 Wall. 216; *St. Louis v. Ferry Co.*, id. 431; *Hoyt v. Comrs. of Taxes*, 23 N. Y. 224; *Mineral Point R. R. Co. v. Keep*, 22 Ill. 18. To constitute an actual situs in this State the property must so abide in the jurisdiction as to become incorpo-

* See *Mayor v. Baldwin* (57 Ala. 61), 29 Am. Rep. 713; *Wheeling Trans. Co. v. City of Wheeling* (9 W. Va. 170), 27 Am. Rep. 552.

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rated with and form a part of its personal property. 11 Wall. *supra*, and 16 id. 476.

WALKER, C. J. In the year 1874 a tax was levied amounting to \$1,155, by the authorities of Alexander county, upon property claimed to belong to the Mississippi Central Railroad Company. Of this tax \$693 was levied on one-half interest of that company in the transfer steamboat "H. S. McComb;" \$559.69 was assessed upon a superstructure for hoisting cars, sometimes called a "car-hoist," and a third rail laid on the track of the Illinois Central Railroad Company's track in the city of Cairo, and \$2.31 was assessed on office furniture of the first-named company.

On the 3d day of July, 1874, the Mississippi Central Railroad Company and the New Orleans, Jackson and Great Northern Railroad Company were consolidated, and assumed the name of the New Orleans, St. Louis and Chicago Railroad Company. That company on the 8th day of February, 1875, filed a bill to enjoin the collection of all of this tax but the \$2.31 levied on the office furniture, which was tendered to the collector before the suit was brought.

The terminus of the Mississippi Central Railroad Company was at Fillmore, on the bank of the Ohio river, in Kentucky, opposite to the city of Cairo. The Illinois Central Railroad Company had its terminus in Cairo, at the bank of the river. Each road had an incline on its side of the river, from which cars were run upon the steamer H. S. McComb, and by it they were carried to the incline on the opposite bank, to go north or south over one or the other road as occasion might require. The steamer was so engaged in May, 1874, when assessed for taxation. It was built for that business, and was then owned by the Illinois Central and the Mississippi Central railroads, each having one-half interest in the vessel.

The tax \$693 was levied on the half of the vessel owned by the Mississippi Central Railroad Company for the year 1874. It is, by plaintiff in error, claimed that this one-half is liable and subject to taxation in this State, whilst on the other side it is claimed that it was not liable or subject to any tax whatever in this State, and not being subject to pay a tax, that equity has jurisdiction to restrain and should enjoin its payment.

If the proposition be true that this property is so situated that it

was not subject to be assessed for taxation under our revenue laws, then a court of equity may afford relief. The first clause of the first section of that law provides that all real and personal property in this State shall be assessed and taxed. The only question then is, was this property in this State, within the meaning of this section, when it was assessed for taxation? This provision of the law does not contemplate the assessment of personal property that is passing through, or is in the State for temporary purposes only. It could not be held that the goods and merchandise of a citizen of Iowa, passing from an Eastern city, by rail, through this State to his home in Iowa, on the first day of May in any year, could be legally assessed for taxation. Although in the State on the day the assessor is required to list all personal property for taxation, and coming within the letter of the statute, it would clearly be contrary to its spirit. The intention of the law-makers was only to subject property to taxation that is more permanently in the State at the time when required to be listed. But the extent of that permanency, it would, under many circumstances, be difficult to define. It is, however, impracticable to lay down any rule that shall govern in all cases. Its ownership, and the uses for which it is designed, and the circumstances of its being in the State, are so various that it cannot be embraced in any general rule.

Whilst the *situs* of personal property is, under many circumstances, considered by the law as being that of its owner, such is not the uniform rule. Under some circumstances it has for some purposes a different *situs* from that of the owner, and such is the case in regard to taxation. Where personal property is permanently located at a particular place, it is liable to be listed there.

The boat was registered in Cairo, and when not in use it laid up in that place. The hands who operated the boat resided there, and the company had its business office in the city — thus incontestably showing that its home port was in Cairo. Against this there are the simple facts that as to the corporation owning the half that was taxed it was one of several corporations chartered by the statutes of three other States, but consolidated and acting as one company, and when the boat was in use it ran to the opposite shore of the river, in Kentucky, — one of the States granting a charter for the companies forming the consolidated corporation. These undoubtedly are important facts in determining the *situs* of this vessel for taxation.

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We presume no one can or will question the fact that the half of the vessel belonging to the Illinois Central Railroad Company is liable to taxation in this State. That half is owned by a corporation in this State, the vessel is registered in this State, and when not in use it lies up in this State, and Cairo would seem to be its home port, and it is permanently located in this State. It is true, that when in use it plies between Cairo and Fillmore, but still Cairo is unquestionably the home port of the vessel.

Both parties have referred to *St. Louis v. Ferry Company*, 11 Wall. 423, as sustaining their position. In that case the ferry company was incorporated by the laws of this State, but had its principal office in St. Louis, Missouri. There its president and other chief officers resided; there the usual business meetings were held, and the seal of the company was kept there; the stockholders of the company mainly resided there, but some resided in Ohio, some in New York and some elsewhere, but none in Illinois. The company's minor officers, such as engineers and pilots on its ferryboats, resided in Illinois, opposite St. Louis, where its real estate was situated, also its warehouse and some other property. The ferry boats, when not in use, were laid up by the Illinois shore, and were forbidden by ordinance to remain at the St. Louis wharf longer than ten minutes at a time. On this state of facts the court held the boats of the ferry company were not liable to be taxed in Missouri, but in Illinois.

The court said, that in a qualified sense personal property accompanies its owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. * * * But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual *situs* and the requisite legislation exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The court further say: "The company has an office in Illinois. Its minor officers, such as its engineers and pilots, lived in Illinois, where its real estate, including a warehouse, was situated." That the "boats, when not in actual use, were laid up at the Illinois shore." * * * "Their relation to the city was merely that of contact there as one of the termini of the transit across the river in the prosecution of their business." "That the owner, in the eye of the law, was a citizen of that State, and from the inherent law of its nature could not emigrate or become a citi-

zen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken as their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained."

The court does not hold that the taxes are illegal because the ferry company was organized under the laws of this State. On the contrary it does say, that the rule that personal property follows the *situs* of the owner is not allowed to stand in the way of the taxing power where the property has its actual *situs*. Instead of saying that the property was taxable in this State because the ferry company is a corporation in this State, the court holds, that under the circumstances of the case the boats were taxable in this State. As much stress is laid on the fact that the minor officers resided in this State, that the Illinois shore was the home port, and the company had real estate and a warehouse thereon on the Illinois side of the river, if not more than on the *situs* of the company.

In the case at bar, the company had an office in Cairo, and their boats laid up there when not in use ; the boat was registered there, and plied between that and the opposite shore of the river, and the officers operating the boat resided there, and it is evident that this was the home port of the vessel. The circumstances are as strong to require the company to pay a tax on this property to this State as were the circumstances in that case.

In Burroughs on Taxation, § 46, it is laid down that the home port, or the port at which a vessel is required to be registered, is the domicile of the vessel.

In the case of *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, where vessels were owned by a corporation in New York, and the vessels were registered in New York, it was held that was their home port, and they were liable to taxation at their home port, and not in California, where they were engaged in the transportation of passengers on the Pacific coast, and ran into and out of California in business ; and the case of *People v. Pacific Mail Steamship Co.*, 58 N. Y. 242, announces the same rule. It is there said, the *situs* of sea-going vessels, for the purposes of taxation, is the port of registration, under the act of Congress, and that is the home port.

Dunne v. People.

The case of *Battle v. Mobile*, 9 Ala. (N. S.) 234, holds that where a boat was registered in Mobile as a coasting vessel, and was plying on the waters of the Alabama river, it was liable to be assessed and taxed in the city of Mobile, although the owner resided in Pennsylvania.

In the case of *Hays v. Pacific Mail Steamship Co.*, *supra*, the court said: "We are satisfied that the State of California had no jurisdiction over the vessels for the purposes of taxation; they were not properly abiding within the limits, so as to become incorporated with other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port where the vessel belonged, and where the owners were liable to be taxed."

One of the principal, if not controlling, facts to be considered seems to be the home port of the vessel—the place where it belongs, so as to become incorporated with the personal property permanently located in the State. This seems to be of more importance than the mere ownership, and hence the *situs* for the purposes of taxation.

We are clearly of opinion that Cairo was the home port of this vessel, and that was its *situs* for taxation, and it was properly assessed in this State for taxation; and the court erred in enjoining this portion of the tax. The decree, to that extent, is reversed.

[Omitting another matter.]

Decree reversed in part, and in part affirmed.

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(94 Ill. 120.)

Constitutional law—power of State as to militia.

The Federal Constitution does not confer on Congress unlimited power over the militia of the several States. Its power is restricted to specific objects enumerated, and for all other purposes the militia of the States remain subject to State legislation. Therefore, a provision of a State militia law making it unlawful for any body of men, other than the regularly organized volunteer militia of the State, and troops of the United States, with an exception in favor of students in educational institutions where military service is taught, to associate themselves together as a military company or

organization, or to drill or parade with arms, in any city or town of the State, without the license of the governor, is not inconsistent with any paramount law of the United States, and is a binding law. It is a matter within the regulation, and subject to the police power of a State to determine whether bodies of men with military organizations or otherwise, under no discipline or command by the United States, or of the State, shall be permitted to parade with arms in populous communities and in public places.

PROCEEDING to punish a jurymen for refusing to serve. The opinion states the case.

Charles A. Gregory, for plaintiff in error.

Lyman Trumbull, Harry Reubens and Wolford N. Low, for defendants in error.

SCOTT, J. Peter J. Dunne, having been summoned to serve as a jurymen in the Criminal Court of Cook county, at the September term, 1879, it was made to appear he was a citizen of Illinois, twenty-two years of age, and that he was an enlisted, active member of the "Illinois National Guard," in Company G, First Regiment, a military company organized and existing under a statute of this State, approved May 28, 1879, and in force July 1, of the same year, entitled "An act to provide for the organization of the State militia, and entitled the Military Code of Illinois," and because of the facts appearing he claimed, under the provisions of the act, which so expressly declares, he was exempt from jury duty, but the court deemed the cause assigned insufficient in law to excuse the juror from service, and notwithstanding the decision of the court he refused to serve in the capacity of a juror, and on account of his contumacy he was fined in the sum of \$50.

Acting on the suggestion of counsel, that it is the desire of both parties to obtain the opinion of this court as to the validity of the act of the general assembly "to provide for the organization of the State militia," approved May 28, 1879, all preliminary considerations as to the manner in which the case comes before the court; and the validity of the act under the Constitution of the State will be waived with a view to proceed directly to the question whether the act, or such parts of it as provide for the organization of the active militia of the State, known as the "Illinois National Guard," is void by reason of its repugnancy to the Constitution of the United States, and to the laws passed in pursuance thereof. It may be

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remarked, although no point is made that the act in question contravenes any provision of our State Constitution, it seems to be in entire harmony with that instrument. Article 12, section 1, Constitution of 1870, is, "The militia of the State of Illinois shall consist of all able-bodied male persons resident in the State between the ages of eighteen and forty-five, except such persons as now are or hereafter may be exempted by the laws of the United States or of this State." And section 2 of the same article is, "The general assembly, in providing for the organization, equipment and discipline of the militia, shall conform as nearly as practical to the regulations for the government of the armies of the United States." On examination it will be seen the act of the general assembly under consideration conforms exactly with these constitutional requirements, as will be made to appear more fully in the sequel of this discussion.

If, therefore, this act of the legislature is void, it must be for one of two reasons assigned: 1. Because of its repugnancy to the Constitution of the United States; or, 2. Because it is inconsistent with and repugnant to the acts of Congress on the same subject, passed in pursuance with authority conferred by the Federal Constitution. The importance of the questions involved has induced the most careful consideration, but it will be our purpose to avoid all unnecessary discussion and state our views as briefly as practicable.

The first proposition submitted against the validity of the act known as the "Military Code," is that the power of organizing, arming and disciplining the militia, being confined by the Constitution of the United States to Congress, when Congress has acted upon the subject and passed a law to carry into effect the constitutional provision, such action excludes the power of legislation by the State on the same subject. This is not, in our judgment, an accurate — certainly not a full — expression of the law. Two things must be assumed to maintain this proposition. 1. That the constitutional provision in respect to the militia is of that character it can only be exercised by Congress, and that any State legislation would of necessity be inconsistent with Federal legislation under that article of the Constitution. 2. That the Constitution itself places a restriction, either directly or by implication, upon all State legislation in respect to the militia. Neither assumption is warranted by any fair construction of the Constitution of the United States, nor by contemporaneous explanations by writers whose

authority is to be respected, nor by any subsequent judicial determinations, with which we are familiar.

Article 1, section 8, division 15, confers power on Congress "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Neither this clause nor any other of the Constitution inhibits in express terms State legislation in regard to the militia. Our understanding is, it is a matter upon which there may be concurrent legislation by the States and Congress. No doubt it is true that some powers granted to Congress are exclusive, and exclude by implication all State legislation in regard to the subject of such powers. It is not true, however, that all powers granted to Congress are exclusive, unless where concurrent authority is reserved to the States. Examples of concurrent authority readily suggest themselves. Congress has power, under the Constitution, "to lay and collect taxes, duties, imposts and excises" but it has never been supposed that grant of power was a restriction upon the States to lay and collect taxes for State purposes. Such a construction would destroy all State governments by taking from them the means of maintaining order or protecting life or property within their jurisdictions. Other examples might be mentioned, but this is sufficient for our present purpose.

It might be well in this connection to call to mind that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power of State governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States, and as its exercise was not prohibited by that instrument, it is understood to remain with the States, subject only to the paramount authority of acts of Congress enacted in pursuance of the Constitution of the United States. The section of the Constitution cited does not confer on Congress unlimited power over the militia of the States. It is restricted to specific objects enumerated, and for all other purposes the militia remain as before the formation of the Constitution, subject to State authorities. Nor is there any warrant for the proposition that the authority a State may exercise

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over its own militia is derived from the Constitution of the United States. The States always assumed to control their militia, and except so far as they have conferred upon the National government exclusive or concurrent authority, the States retain the residue of authority over the militia they previously had and exercised. And no reason exists why a State may not control its own militia within constitutional limitations. Its exercise by the States is simply a means of self-protection.

The States are forbidden to keep "troops" in time of peace, and of what avail is the militia to maintain order and enforce the laws in the States unless it is organized? "A well-regulated militia" is declared to be "necessary to the security of a free State." The militia is the dormant force upon which both the National and State governments rely "to execute the laws, * * * suppress insurrections and repel invasions." It would seem to be indispensable there should be concurrent control over the militia in both governments within the limitations imposed by the Constitution. Accordingly, it is laid down by text writers and courts that the power given to Congress to provide for organizing, arming and disciplining the militia is not exclusive. It is defined to be merely an affirmative power, and not incompatible with the existence of a like power in the States; and hence the conclusion is, the power of concurrent legislation over the militia exists in the several States with the National government.

The case of *Houston v. Moore*, 5 Wheat. 1, is an authority for this construction of the Constitution. The question before the court in that case, as concisely stated by Kent, in his Commentaries, in discussing the power of Congress over the militia was, whether "it was competent for a court-martial, deriving its jurisdiction under State authority, to try and punish militiamen, drafted, detached and called for by the President into the service of the United States, who refused and neglected to obey the call;" or as stated by STORY, J., the only question cognizable by the court on the record before them arose on the refusal of the "State Court of Common Pleas to instruct the jury that the first, second and third paragraphs of the 21st section of the statute of Pennsylvania of the 28th of March, 1814, as far as they related to the militia called into the service of the United States under the laws of Congress, and who failed to obey the orders of the President of the United States, are contrary to the Constitution of the United States and the laws

of Congress made in pursuance thereof, and are therefore null and void. The court instructed the jury that those paragraphs were not contrary to the Constitution or laws of the United States, and were therefore not null and void." Notwithstanding there was a law of Congress that provided for the organization of courts-martial for the trial of militia, drafted, detached, called forth into the service of the United States, to be conducted as courts-martial for the trial of delinquents in the army, the court decided that the militia, when called into the service of the United States, were not to be considered in that service or in the character of National militia, until they were mustered at the place of rendezvous; and until then the State retained a right, concurrent with the government of the United States, to punish their delinquency. The statute that formed the ground of controversy in the State court enacted that non-commissioned officers and privates in the militia who should neglect or refuse to serve when called into the actual service of the United States, in pursuance of an order or requisition of the President, should be liable to certain penalties, defined in the act of Congress of 1795. The judges concurring in the decision of the court did not concur in all the reasoning by which the conclusion was reached, and they seem to have coincided only in the decision the State law was valid. WASHINGTON, J., delivered the principal opinion. JOHNSON, J., gave a concurring opinion, and STORY, J., delivered a dissenting opinion, in which another member of the court concurred.

Although neither opinion had the sanction of a majority of the court as to all it contains, yet on many subjects discussed the judges all agreed, and as the several opinions contained the views of these eminent legists on these important questions, they are entitled to the highest consideration. After stating his conclusion that the offense of disobedience to the President's call upon the militia is not exclusively cognizable before courts-martial of the United States, WASHINGTON, J., adds, "It follows then, as I conceive, that jurisdiction over this offense remains to be concurrently exercised by the National and State courts-martial, since it is authorized by the laws of the State and not prohibited by those of the United States." There being no repugnance in the State law with the law of Congress, in his opinion, the conclusion he reached, after an extended examination of the case, was, the State court-martial had a concurrent jurisdiction with the tribunal pointed out by the

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act of Congress to try a militiaman who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent.

JOHNSON, J., conceded fully that concurrent power of legislation over the militia existed in the States with the National government. STORY, J., in the opinion he gave, was even more pronounced in the expression of similar views, and in speaking of the power granted to Congress by the Constitution to call forth the militia to execute the laws of the Union, and to organize, arm and discipline the same, said : "It is almost too plain for argument, that the power here granted to Congress over the militia is of a limited nature, and confined to the objects specified in these clauses, and that in all other respects and for all other purposes the militia are subject to the control and government of the State authorities." All the judges concurred, as we understand their opinions, in the proposition, that when Congress has once acted within the limits of the power granted in the Constitution, its laws for organizing, arming and disciplining the militia are supreme, and all interfering regulations adopted by the States are thenceforth suspended, and for the same reasons all repugnant legislation is unconstitutional. That principle applies only where Congress has assumed control of the militia under granted powers, and does not militate against the construction uniformly given to the Constitution by Kent and other writers, "that a State may organize and discipline its own militia, in the absence of or subordinate to the regulations of Congress." It is only repugnant and interfering State legislation that must give way to the paramount laws of Congress constitutionally enacted. The cases that support this doctrine are numerous and of the highest authority. *Houston v. Moore*, 5 Wheaton, 1; *Sturgis v. Crowenshield*, 4 id. *122; *Livingston v. Van Ingen*, 9 Johns. 507; *Houston v. Moore*, 3 Serg. & Rawle, 170* ; *Opinion of the Justices*, 14 Gray, 614; *Gilman v. Philadelphia*, 3 Wall. 713; *United States v. Cruikshank*, 92 U. S. 542; *Blanchard v. Russell*, 13 Mass. 1; 7 Am. Dec. 106; *Caldee v. Bull*, 3 Dallas, 386; 1 Kent's Com. 265, 389. No case has been cited that holds a contrary doctrine except *Golden v. Prince*, 3 Wash. C. C. 313; and what was said by the same judge in *Houston v. Moore*, *supra*. We are not aware that the opposite views expressed by Judge WASHINGTON in either of those cases have ever been followed by any court. In *Houston v. Moore*, JOHNSON J., expressly controverts the pro-

position, "that within the scope Congress may legislate, the States may not legislate," and speaks of it as an exploded doctrine.

Nor do we think the reservation of the power "to the States, respectively, of the appointment of the officers and the authority to train the militia according to the discipline prescribed by Congress," as suggested by counsel, puts any restriction upon the States in respect to the concurrent legislation concerning the militia. Mr. Justice STORY, in speaking of that clause of the Constitution, says "that reservation constitutes an exception merely from the power given to Congress to provide for organizing, arming and disciplining the militia, and is a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers." Obviously that is all that clause of the Constitution does mean, and we adopt as our own view what that able jurist added: "The exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia."

But the principal argument is made on the other branch of the case, viz.: that the act of the general assembly "to provide for the organization of the State militia" is repugnant to the laws of Congress on the same subject constitutionally enacted, and is for that reason null and void. Wherein the "spirit, intent and effect of the Illinois statute is in conflict with the provisions of the act of Congress," as insisted on the argument, is not apparent. Neither in the title of the act nor in any of its provisions does it appear the object of the State law is in conflict with the National law. The first section declares, "that all able-bodied male citizens of this State, between the ages of eighteen and forty-five years, except such as are expressly exempted by the laws of the United States, or are State or county officers, or on account of their profession or employment are exempted by the commander-in-chief, shall be subject to military duty and designated as the 'Illinois State Militia.'" That is in exact conformity with the act of Congress of 1792, and what more could the legislature do? The contention of counsel is, that an act of the State legislature to organize the militia, if in conformity with the act of Congress on that subject, "is inoperative and amounts to nothing," and if it differs from the act of Congress, it is "equally inoperative and void." Assuming that to be a correct proposition, — and if it is confined to the organization and arming of the militia called to enter the active service of the

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United States, it is the law — then the act of the legislature is as comprehensive as it could constitutionally be made, so far as it purports to declare who shall constitute the whole body of the militia under the act of Congress.

The second section is a declaration of legislative intention on the part of the State to co-operate with the general government in the matter of enrolling and organizing the entire militia of the State, when it shall become necessary “to execute the laws, suppress insurrection or repel invasions or quell riots, or when a requisition shall be made by the President of the United States for troops,” and should be read in the light of facts historically known to all. For many years after the adoption of the Federal Constitution, State laws provided for enrolling and training of the militia in conformity with the act of Congress. It was usual to have annual, and in some States more frequent, days for drilling and training, and persons liable to military duty were compelled to attend under penalties; but for a third of a century or more there has been very little effort, if any, made to organize and train the entire body of the militia, and all State laws designed to effectuate that purpose have either been repealed or suffered to fall into disuse. It has become the settled conviction in the public mind that militia training, as it was practiced in the States, was of no practical utility. Besides that, it would be a most gigantic and expensive undertaking to enroll and supply the entire militia of the United States with arms and ammunition, as provided in the act of 1792. The annual appropriation of the sum named in that act for that purpose is insignificant as compared with the amount it would necessarily cost. As the laws now are, it is improbable the entire militia of the States will ever be enrolled or summoned for discipline under the act of Congress, unless some great impending danger shall make it necessary. When such an exigency does occur, this statute makes it the duty of the governor, as commander-in-chief, by proclamation, to require the enrollment of the entire militia of the State, or such portion thereof as shall be necessary in the opinion of the President, and to appoint enrolling officers and to make all orders necessary to aid in the organization of the militia. Such a law is not in contravention of the act of 1792 or with any other act of Congress in relation to the organization of the militia, but is rather in aid of all such laws.

The remaining sections of the act, with the exception of those

contained in article 11, relate to organization, arming, drilling and maintaining the "active militia" of the State. The designation "Illinois National Guard," applied to the active militia, is a matter of no consequence, and the act will be construed as though it did not contain those words. That a State may organize such portions of its militia as may be deemed necessary in the execution of its laws and to aid in maintaining domestic tranquillity within its borders, is a proposition so nearly self-evident that it need not be elaborated at any great length. "A well-regulated militia being necessary to the security of a free State," the States, by an amendment to the Constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the Constitution to call out the militia "to execute the laws, suppress insurrection and repel invasion." This would be a mere barren grant of power unless the State had power to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and property within the limits of the State. These are duties that devolve on the State, and unless these rights are secured to the citizen, of what worth is the State government? Failing in this respect it would fail in its chief purpose. But what reason is there why a State may not organize its own militia for its own purposes? As we have seen, the State has the power of concurrent legislation with the National government over the militia, when not in the actual service of the United States, within limits quite accurately defined in law as well as in the decisions of courts, both State and Federal. Certainly Congress has not exclusive jurisdiction over the militia not actually employed in its service. Congress may provide for "organizing, arming and disciplining" the militia, but the appointment of officers and the authority to train the militia according to the discipline prescribed by Congress is reserved to the States. There can therefore be no efficient organization of the militia when not called into the service of the Union, without the co-operative aid of the States. Congress may not deem it necessary to exercise all the authority with which it is clothed by the Constitution over the militia. Historically we know there has been no efficient organization of the militia in this State within the last thirty or forty years.

Mr. STORY, in the opinion he gave in *Houston v. Moore*, said:

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"It would certainly seem reasonable that in the absence of all interfering provisions by Congress on the subject, the States should have the authority to organize, arm and discipline their own militia. The general authority retained by them over the militia would seem to draw after it these necessary incidents." These were but an expression of his individual views, but any thing written by that eminent jurist on this subject is entitled to great consideration, and as his views are an accurate expression of our understanding of the meaning of the Constitution in this respect, we adopt them as our own.

Judge WASHINGTON, in the opinion he gave in *Houston v. Moore*, conceded that if Congress did not exercise the power of providing for organizing, arming and disciplining the militia, it was competent for the States to do it.

GIBSON, J., in the opinion he delivered in *Houston v. Moore*, 3 S. & R. 192*, said: "It cannot be questioned but that the Federal and State governments have concurrent authority over the militia when not in actual service of the United States. Congress has power to organize and arm — a State may do the same. The government of the Union may draw out the militia in any of the exigencies mentioned in the Constitution. A State may employ its own militia for its own purposes."

In the *Opinion of the Justices*, 14 Gray, 614; after announcing their conclusion that the Commonwealth could not constitutionally provide for the enrollment in the militia of any person other than those enumerated in the act of Congress of 1792, they said: "We do not intend by the foregoing opinion to exclude the existence of a power in the State to provide by law for arming and equipping other bodies of men for special service of keeping guard and making defense under special exigencies or otherwise, in any case not coming within the prohibition of that clause of the Constitution, art. 1, § 10, which withholds from the State the power to keep troops." But aside from all authority, on any fair construction of the Constitution, a law to organize the militia of the State for its own purposes, not inconsistent with any law of Congress on that subject, is valid. In right of its sovereignty a State may employ its militia to preserve order within its borders when the ordinary local officers are unable, on account of the magnitude of the disturbance, or of any sudden uprising, to accomplish the result. Our conclusion therefore is, the general assembly might enact the law in question,

and that its general scope and effect are not in antagonism with any act of Congress on the same subject. Although, in minor matters of detail in the organization of the active militia of the State, some regulations might be found not in harmony with the act of Congress, the utmost that could be said would be that they would give way to the paramount laws of the United States.

That being the case we might here close the discussion, for if the law in relation to the militia in the main is a constitutional enactment, it would be a sufficient warrant for the conduct of defendant, notwithstanding some minor regulations might be invalid because in conflict with the laws of the United States.

But as we have been urged by both parties to do so, we will briefly state our views on some of the most important provisions and regulations found in the State law which, it is insisted, are in conflict with acts of Congress and for that reason render the whole act inoperative and void. We will be assisted to a clearer understanding of the remaining questions to be discussed, by keeping in mind a few propositions which are so plain as to admit of no controversy:

1. The repugnancies alleged to exist in the Military Code of the State with the acts of Congress, are all to be found in those sections of the statute which relate to the organization of the active militia when organized for State purposes, and not to those sections which relate to the entire body of the militia, nor to the militia when called into the service of the United States.

2. The acts of Congress prescribe essentially different regulations for the organization of the militia when called into actual service, and for the organization for training under State authority. Many of the latter seem to be only directory, while the former all appear to be mandatory.

3. When not in actual service, the act of 1792 provides, "the militia of each State shall be arranged into divisions, brigades, regiments, battalions and companies, as the legislatures of the States may direct."

4. Non-essential differences in the regulations as to militia not in actual service of the Union, contained in a State law, with acts of Congress, will not render the former invalid.

It is no valid objection to this act of the legislature that it does not require the entire militia of the State to be enrolled as "active militia." Counsel do not wish to be understood as claiming that

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no militia law is valid unless it provides that each and every male inhabitant of the specified age should at all times be armed and equipped and engaged in drilling and maneuvering. But the argument made is, that the performance of military service in times of peace cannot be legally confined to a select corps consisting of a limited number of volunteers to the exclusion of all other able-bodied male residents of the State. The argument admits of several conclusive answers that may be shortly stated : 1. It is a matter dependent on the wisdom of Congress whether it will provide for arming and disciplining the entire body of the militia of the United States; 2. The citizen is not entitled under any law, State or Federal, to demand as a matter of right that arms shall be placed in his hands ; and 3. It is for the legislative judgment to decide of what number the active militia of the State shall consist, depending on the exigency that makes such organization necessary.

Numerous minor repugnancies, it is insisted, exist in the State law with the acts of Congress, among which it is said the State law fixes the numerical strength of a company at a number different from the act of Congress. As we have seen, the matter of organizing the militia when not in actual service, but for the purpose of training, under the act of Congress, into divisions, brigades, regiments, battalions and companies, shall be done as the State legislatures may direct. In respect to the number of men that shall compose a company, the language of the United States law is, "each company may consist of sixty-four privates ;" but it is not made inoperative. The same may be said as to the omission in the State law to provide for the appointment of a major-general. Such an officer might find no appropriate position in the active militia of the State. Upon the requisition of the President upon the State executive for the militia for active service in the Union, it is then made the duty of the executive to organize the whole body of the militia, or such portion as the President may direct, in conformity with the acts of Congress. In that event, under the act of 1792, each company shall have from sixty-four to eighty-two privates. In a complete organization of the militia, such as the executive of the State is authorized to make on the requisition of the President or otherwise, a major-general would be an appropriate and necessary officer.

Another repugnancy is said to consist in "substituting the organization of the regular army for the militia." Exactly what counsel

means or wishes us to understand by the use of the word "organization," we may not comprehend fully. If it is meant, what shall be the constitution of a regiment, battalion or company under the State law, then it is not in conflict with the act of Congress of 1792, for it provides that may be done as the "legislature of the State may direct." But if the discipline and exercises to be enforced and observed in the State militia organization is meant, then it may be noted that the act of 1820 provides, "the system of discipline and field exercise which is ordered to be observed in the different corps of infantry, artillery and riflemen of the regular army, shall also be observed in such corps, respectively, of the militia." That provision may be applicable to the militia only when called into the service of the United States, but if it applies as well to the militia not in actual service, then there is no repugnancy between the act of Congress and the State law in this respect.

But there is another view that may be taken. The act of Congress provides that the militia, when called to the actual service of the United States, "shall be subject to the same rules and articles of war as the regular troops of the United States." The "active militia" of the State is simply a reserve force, that the executive is authorized by the Constitution to call to his aid in case of a sudden emergency — "to execute the laws, suppress insurrection and repel invasion" — and it is most probable it was the design of the general assembly to make its "organization," "equipment," and "discipline" the same as the militia when in the actual service of the United States, as being the most effective. In either view no such repugnance is perceived between State and Federal legislation in this respect as would render the former invalid.

An objection broader in its scope than either of those noted is, that the active militia organized under the statute comes within the prohibition of the second clause, section 10, article 1, of the Constitution of the United States, which withholds from the States the power to keep "troops" in time of peace. Our understanding is, the organization of the active militia of the State conforms exactly to the definitions usually given of militia. Lexicographers and others define militia, and so the common understanding is, to be "a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace." That is the case as to the active militia of this State. The men comprising it come from the

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body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it. Such an organization, no matter by what name it may be designated, comes within no definition of "troops," as that word is used in the Constitution. The word "troops" conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the State bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular "troops," and is only liable to be called into service when the exigencies of the State make it necessary.

The fact the men comprising the active militia are required to be sworn to obey the "orders of the commander-in-chief and such other officers as may be placed over" them is made a ground of unfavorable comment. The oath the militia are required to take obligates them to "bear true allegiance to the United States and the State of Illinois," and to "support the Constitution thereof." Obviously, the obedience the militia are bound to observe to the orders of the governor is when they are in the service of the State, and not in actual service of the United States. And why should they not observe the orders of the governor? He is, by the State Constitution, made the commander-in-chief of the militia when not in service of the United States. An intention to provide that the militia shall be subject to the orders of the governor, when in the actual service of the Union, should not be imputed to the legislature when a contrary construction, which is clearly warranted by the context, would hold the law a constitutional enactment. This principle was recognized and declared in *Middleport v. Aetna Insurance Co.*, 82 Ill. 562.

Among the general provisions contained in article 11, sections 4, 5 and 6 have been made the subjects of severe criticism as being repugnant in some way to the laws of the United States. All these sections might be eliminated from the statute, if found repugnant to acts of Congress passed in pursuance of the Constitution, and that would not affect in the slightest degree the efficient organization of the active militia of the State. They are simply what they purport to be — "general provisions." But with what acts of Congress are they inconsistent or repugnant? Section 4 provides: "No military company shall leave the State with arms and

equipments without the consent of the commander-in-chief." If we give to this section of the statute a common-sense construction and narrow its application to the militia when not in the actual service of the United States, as must have been the intention of the legislature as clearly appears from the whole spirit of the act, we are relieved from all embarrassment as to its meaning. Assuming, as a proposition too plain to admit of doubt, that this section of the statute applies only to the militia when not in the service of the United States, it may well be asked what right has a body of militia, organized into a military company, "with arms and equipments" furnished by the State, to go into another State, beyond the jurisdiction of this State, without the consent of the commander-in-chief? The mere statement of the question is sufficient to suggest a negative answer. The presence of such armed forces in another State might tend to disturb our friendly relations with such State, and might be the cause of embarrassing complications.

The fifth section contains a clause that makes it unlawful "for any body of men whatever, other than the regularly organized volunteer militia of this State and the troops of the United States," with an exception in favor of students in educational institutions where military science is taught as a part of the course of instruction, "to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this State, without the license of the governor." We have been referred to no source whence comes the right contended for, to bodies of men organized into military companies, under no discipline by the United States or State authorities, "to parade with arms," in any city or public place as their inclination or caprice may prompt them. No such right is conferred by any act of Congress, nor is it insisted this provision of our statute is in conflict with any paramount law of the United States. It is a matter that pertains alone to our domestic polity. The right of the citizen to "bear arms" for the defense of his person and property is not involved, even remotely, in this discussion. This section has no bearing whatever on that right, whatever it may be, and we will enter upon no discussion of that question. Whether bodies of men, with military organizations or otherwise, under no discipline or command by the United States or the State, shall be permitted to "parade with arms" in populous communities, is a matter within the regulation and subject to the police power of the State. In

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matters pertaining to the internal peace and well-being of the State, its police powers are plenary and inalienable. It is a power co-extensive with self-protection, and is sometimes termed, and not inaptly, the "law of overruling necessity." Every thing necessary for the protection, safety, and best interests of the people of the State may be done under this power. Persons and property may be subjected to all reasonable restraints and burdens for the common good. Where mere property interests are involved, this power, like other powers of government, is subject to constitutional limitations; but where the internal peace and health of the people of the State are concerned, the limitations that are said to be upon the exercise of this power are, that such "regulations must have reference to the comfort, safety and welfare of society." It is within the power of the general assembly to enact laws for the suppression of that which may endanger the public peace, and impose penalties for the infraction of such laws. What will endanger the public security must, as a general rule, be left to the wisdom of the legislative department of the government. The provision contained in the fifth section cited was intended by its restraining force to conserve the public peace. That being its object, it is not an unreasonable restraint upon the liberty of the citizen, and is within no limitation upon the exercise of the police power of the State.

The judgment will be reversed and the cause remanded.

Judgment reversed.

MULKEY, J., dissented.

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(94 Ill. 349.)

Negligence — dangerous premises — hotel — contributory negligence.

Plaintiff was a guest over night at a hotel kept by defendant. He was assigned room thirty eight, on the second story. Adjoining that room, and on the same side of the hall, was a door nearly or exactly like the door of the room, and only two and one-half feet distant, communicating with an elevator-opening extending from the second floor to the cellar of the hotel. Gas was dimly burning in the hall. The rooms on the hall were numbered with white figures about one inch in length, which could have been read by any one intent on observing them. The doors of the plaintiff's room and of

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the elevator-opening were numbered in this way, thirty-eight and forty, respectively, and had knobs exactly alike. Both doors had locks and keys, but neither of them was locked on the night in question. The door to the elevator-opening was hung flush with the surface of the wall of the hall, and opened into the hall, while the door of the bed-room was set in the usual distance and opened into it. Room thirty-eight was a corner-one, the last on the hall. Having recently been a guest at the house, and having occupied room thirty-eight, plaintiff believed he knew the location, and could find it without assistance, and discharged the bell-boy who had been directed by the clerk to show him his room. He proceeded, as he supposed, to room thirty-eight, but by mistake opened the door numbered forty, and stepping in fell to the basement through the opening, sustaining severe injuries. An employee of the defendant had previously fallen there and been injured, as the defendant knew. *Held*, that defendant was grossly negligent, and plaintiff was not guilty of material contributory negligence.*

ACTION of negligence for personal injuries. The opinion states the case. The plaintiff had judgment below.

Anthony Thornton for appellant. The having the "elevator hole" was not *per se* negligence. Trap-doors, hoistways and similar openings in floors are a useful and necessary part of the machinery of business, etc., and the mere fact of their existence and use is no evidence of negligence. *Shearm. on Neg.*, § 508.

S. W. Moulton and *J. W. Kitchell*, for appellee.

SCOTT, J. This action was brought by John A. Merrill against John A. Hayward, to recover for personal injuries. Plaintiff was a guest at a hotel kept by defendant. Adjoining the room assigned to plaintiff, and on the same side of the hall, was a door nearly or exactly like the room door, and only two and one-half feet distant, that opened to an "elevator" opening from the second floor to the cellar of the hotel building. Gas was burning in the hall on the same floor where the room plaintiff was to occupy was situated, but not very brightly. The rooms on either side of the hall were numbered with white figures about one inch in length, and could no doubt be read by the light in the hall by any one intent on observing them. The room plaintiff was to occupy was numbered on the door "38," and the door to the elevator opening was numbered, in the same way, "40." The doors had the same trimmings, — the knobs

*To same effect, *Camp v. Wood* (76 N. Y. 92), 33 Am. Rep. 282. See note, 26 Am. Rep. 363.

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on them being exactly alike. Both doors had locks and keys, but neither of them seems to have been locked on the night of the accident to plaintiff. The door to the "elevator" opening was hung on the outside of the jams and even with the surface of the hall, and opened out into the hall, while the door to the bed-room set in the usual distance and opened into it. Room "38" was the last one on the left-hand side of the hall, being a corner room. Two sides of the "elevator" opening were inclosed by plastered walls of this room.

Having recently been a guest at the house, and having occupied room "38," which was now assigned him, plaintiff believed he knew the location of the room, and could readily find it without the assistance of the bell-boy that had been directed, by the clerk in the office, to show him to his room. After discharging the bell-boy, he proceeded as he supposed to room "38," being the last room on the left side of the hall, but by mistake opened door numbered "40," and on stepping in to light a match, he fell to the basement through the "elevator" opening, sustaining very severe injuries.

On the trial in the Circuit Court plaintiff recovered a judgment for \$2,000. That judgment, on defendant's appeal, was affirmed in the appellate court, and defendant brings the case to this court on appeal.

One ground insisted upon for the reversal of the present judgment is that plaintiff was guilty of contributory negligence; and as it is said defendant was not guilty of gross negligence in regard to that which caused the injury to plaintiff, it is contended with great confidence the findings in the courts below were not warranted by the evidence. The argument made on these questions might with great propriety have been made in the courts whence this case comes. The same questions were no doubt made before the jury, and the finding was against defendant. That finding was afterward, on defendant's appeal, affirmed in the appellate court, where it was the duty of the court to review the evidence as to the negligence of the parties. But no such duty devolves on this court. Only questions of law are reviewable in this court in such cases. The finding of the facts by the appellate court is by the statute made conclusive upon this court. The jury must have found from the evidence before them that defendant was guilty of such negligence, and that plaintiff observed such care for his personal safety, as would author-

ize a recovery. That finding was affirmed by the appellate court. The affirmance of the judgment implies as much.

It is now insisted this court shall pronounce that the evidence in the record is no sufficient warrant for the action of the lower courts. This we have no rightful authority to do. So far as the questions made are questions of fact, or so far as they depend on facts, this court is conclusively bound by the finding of the appellate court as to them. It may therefore be assumed that plaintiff has established a right of recovery, and the most important question presented for our consideration is whether the damages found are excessive.

[Omitting this.]

It is conceded the second instruction, to which objection is taken, states correctly an abstract principle of law. It is said it contains no reference to the duty devolving on plaintiff to observe due care for his personal safety. That principle was fully declared in the preceding instruction, and it was not necessary to repeat it in this one. The principle announced was applicable to the facts, and it was entirely proper the court should give it. Nor do we perceive the force of the criticism made on the fourth instruction of the series given for plaintiff. It states the well-understood principle that any one keeping a hotel must use ordinary care to prevent accidents to persons who may be guests at his house, and then it is added, if the "elevator opening" was dangerous to guests unacquainted with its location, it was the duty of defendant to take ordinary care by suitable protections to insure the safety of guests at the hotel. That is the law as applicable to the facts of this case as it comes before us. That which caused the injury to plaintiff was a dangerous opening, and if we accept as proven that which the testimony tends to establish, it was certainly not sufficiently protected. It was known to defendant to be dangerous, for one of the employees of the hotel had fallen there, and been injured in the same way, and the conclusion is fully warranted that the omission to better secure it was gross carelessness. Conceding that plaintiff was guilty of a want of some degree of care, still it was slight in comparison with the negligence of defendant, which we are, on authority from the findings of the lower courts, to believe was gross, in permitting the continued existence of such an opening in his house after it was known to him to be dangerous both to employees and guests.

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The proprietor of a hotel to which he invites the public to come, that he may make gains thereby, has no right to permit the existence of such an opening as this one was, unless suitably guarded, that the slightest mistake on the part of the guest might not prove fatal. Had plaintiff been intent on observing the number on the room door he might have discovered the room he wished to enter, but by the merest accident he opened the next door, and this slight inattention was the cause of his severe injuries. The opening ought to have been better protected than it was, and the omission to do so, under the circumstances proven, may well be attributed to defendant as gross negligence.

The judgment will be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Davis v. Central Congregational Church of Jamaica Plain*, Massachusetts Supreme Court, 1880, a meeting of a conference was, with the consent of the pastor and officers of the defendant society, a Congregational church, held in defendant's edifice, and all members of certain congregations of the same religious body were invited to attend in the usual manner. Plaintiff, who was a member of one of the congregations mentioned, attended the meeting, and was injured by (without his own fault) falling over a dangerous wall which defendant had constructed upon its premises. *Held* that there was enough to justify the jury in finding that plaintiff attended the meeting by defendant's invitation, and that in such case defendant was bound to keep its premises safe for plaintiff. To maintain an action for injury under such circumstances, it must be shown that the defendant was chargeable with some neglect of duty which it owed to the plaintiff, by reason of which she suffered the injury complained of. The owner or occupier of real estate is under no obligation to keep the premises safe for those who enter without inducement or invitation express or implied; and the plaintiff must show, that at the time of the injury, she was passing over the way in question by the invitation of the defendant, and not by mere license or permission. The fact that the plaintiff was induced by the defendant to enter upon a dangerous place without warning is the negligence which entitles the plaintiff to recover. *Sweeney v. Old Colony R. R. Co.*, 10 Allen, 368; *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 216; *Larne v. Farren Hotel Co.*, 116 id. 67. The authority given by the defendant to the conference to hold its meetings in this place implied an authority to secure an attendance by invitations given in the known and usual manner. The application of the rules on which the defendant's liability depends is not affected by the consideration that this is a religious society, and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff came by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that, too, although the defendant, in giving the invitation, was actuated only by motives of friendship and Christian charity.

In *Burchell v. Hickison*, C. P. Div., Nov. 1880, the plaintiff, a boy, four years old, accompanied his sister, who went on business to the defendant's home. A flight of steps, protected on either side by railings, led up to the front door. One of these railings was displaced, and the plaintiff, following his sister up the steps, fell through the gap into the area, and was injured. The defendant occupied the basement, and let the remainder, together with the front steps and railing. At the time of letting, the railings were out of repair, and there was no agreement or covenant to repair. *Held*, that plaintiff was in no higher position than that of a person lawfully on the premises; that the duty of the defendant toward him was to take care there was no concealed danger or trap; and there was no evidence of such to go to the jury.

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In *Bennett v. Louisiana and Nashville R. Co.*, U. S. Supreme Court, January 10, 1880, the facts as stated by the court, were as follows: "In the year 1876, the deceased was a passenger on the cars of the defendant company from Vernon to Danville, in the State of Tennessee. At the last-named place he left the train for the purpose of taking the steamer *Rapidan*, which belonged to the Evansville and Tennessee River Packet Company, and was engaged in the navigation of that river. Its customary place of landing for Danville and immediate vicinity, on that side of the river, was at a wharf-boat, moored at or against a lot, within a few hundred yards of the railroad station. Between the railroad company and the packet company there was, at the time, an arrangement or contract, by the terms of which each party enjoyed a community of interest (in what proportion it is not stated) in the freight and passenger traffic at that point. They were mutually at liberty to sell through tickets, and give through bills of lading, over their respective lines. Both the wharf and the lot were owned by, and were under the exclusive control of, the railroad company. The former was used by the company and the public for storing freight, and as a convenient place for the landing of steamboats navigating the river. The lot had been purchased and used by the company in connection with the wharf-boat, for the purpose of facilitating its passenger business, as well as for the receipt and discharge of freight coming from the river to the railroad, or going from the railroad to the river. For such use of its wharf-boat and landing the railroad company received benefit and compensation. To further facilitate their freight and passenger business, the railroad company had erected and maintained upon such lot, in front of the wharf-boat, a large open shed depot, about 240 feet in length, and 20 feet in width, in the centre of which was a room or apartment containing an engine, which was used for the purpose of hauling freight to and from the river by means of flats or cars drawn by ropes on railroad tracks. These cars were pulled up the bank into spaces (of which there were four, two on each side of the engine-room) left in the floor of the depot. These spaces or hatch-holes, as they are called, were about eleven feet in extent, and reached from the river side of the depot nearly to its centre.

"The customary, and indeed, the only safe, available and convenient route for persons passing from Danville to the steamboat landing, was along a plankway (on each side of which the ground was low and marshy), put down by the railroad company, about 600 yards in length, extending from Danville along a side track to the railroad, and terminating at or near the northern end of the depot; thence up a flight of steps to the depot floor, and across the floor of the depot toward its southern end; thence down a flight of steps, located between two of the hatch-holes, to the wharf-boat, over a macadamized or gravel way, which the railroad company had constructed for the convenience of those going upon business to or from the steamboat landing. The custom of travellers, passing between the railroad station at Danville and the steamboat landing, to use as a footway the plankroad, the depot floor, and the macadamized way leading to the wharf-boat, was not only a necessary one, but was known to and permitted by the company. There was no path or safe or convenient way around the shed depot to the wharf.

"Such was the situation when the deceased reached Danville by the cars of the company. He stopped at a hotel to await the coming, that night, of the Steamer *Rapidan*, whose usual hours of arrival at the landing were known to the railroad company. Some time after midnight the steamer reached the vicinity of the landing, and by whistle signalled for landing at the wharf-boat. Deceased started from the hotel for the steamboat for the purpose of prosecuting his journey, taking with him a lighted lantern. He went upon the plankway leading to the shed depot, having been informed by the landlord that that was the proper route to take. He had proceeded but a short distance when the wind extinguished the light, and fearing the boat would immediately depart, and being able to see the plankway, he proceeded to the depot (which was unlighted), and passing up the steps at its northern end, he attempted to cross the floor in the direction of the steps, at the southern end, leading down to the macadamized or gravel way which we have described. He was unaware of the existence of the openings or hatch-holes in the depot floor, or of any other obstruction or danger in his path, and although using due care, he fell through one of the hatch-holes (which had been left uncovered and unguarded for some time before), down a distance of at least five feet, upon the cross-ties and rails beneath. By the fall his left ankle and foot were broken and crushed, causing severe and permanent injury, attended by

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sickness and long confinement to his bed. The demurrer concedes that the company were aware, as well of the condition of the hatch-holes in the depot floor, as that such condition was unsafe and dangerous to the travelling public "

The action was sustained, the court observing: "The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule—founded in justice and necessity, and illustrated in many adjudged cases in the American courts—that the owner or occupant of land, who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation. *Railroad Co. v. Hanning*, 15 Wall. 659; *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 217; *Sweeney v. Old Col.*, 10 Allen, 373; Wharton's Law of Negligence, §§ 349-352; Cooley on Torts, 604-7, and authorities cited by those authors. The last-named author says that when 'one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.' "

The court then cited and quoted from *Crusby v. Hill*, *Chapman v. Rothwell*, and *Indermaur v. Daves*, which are sufficiently set forth in note, 28 Am. Rep. 562, and then proceeded:

"In *Lancaster Canal Co. v. Panaby*, 11 Ad. & El. 242, which was the case of a company making a canal for their profit, and opening it to the public use on payment of tolls, it was held by the Exchequer Chamber that the common law, in such a case, imposed a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for the public use of all choosing to navigate it, that they may navigate it without danger to themselves or property.

"The same principle was applied by the Exchequer Chamber in *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 173. That was an action by the owners of a ship to recover for an injury done to the cargo by reason of the ship, when entering, having struck a bank of mud carelessly and negligently left in and about the entrance to the dock. The defendants were not individually profited by the operations of the company of which they were trustees, but by statute, were bound as such trustees to apply the tolls received in maintaining the docks, and in paying the debt contracted in making them. The court, speaking by COLERIDGE, J., held, that whether the defendants received the tolls for a beneficial or fiduciary purpose, the knowledge, upon their part, that the entrance to the dock was dangerous, imposed upon them the duty of closing the dock against the public as soon as they became aware of its unsafe condition; that they had no right, with a knowledge of its condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on the payment of the tolls to them, might enter and navigate the dock.

"The judgment was affirmed upon full consideration in the House of Lords, 11 H. L. Cas. 686. In the opinion, there delivered by Mr. Justice BLACKBURN, on behalf of all the judges who heard the argument, among whom were Lords CRANWORTH, WENSLEYDALE, and WESTBURY, it was said, 'for a body corporate never can either take care or neglect to take care, except through its servants; and (assuming that it was the duty of the trustees to take reasonable care that the dock was in a fit state) it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty and did not take reasonable care that it was fit.'

"We forbear further citation of authorities. It is clear that the rule which obtains in the English courts is in harmony with that generally recognized in the courts of this country.

"That upon the case as made by the pleadings the railroad company is liable in damages none of us entertain any doubt. As the deceased did not purchase from the railroad company a through ticket, but only a ticket over its line from Vernon to Danville station, it may be argued that the relation of carrier and passenger which existed between him and the company, terminated when the latter left the train at Danville station, and consequently, that there was no breach of the company's contract of transportation. But there

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was nevertheless a breach of legal duty or obligation for which, as property owner, the railroad company is responsible.

"It cannot be pretended that Bennett, at the time he was injured, was in any sense a trespasser, upon the premises of the company. Nor is this case like many, cited in the books, of mere passive acquiescence by the owner in the use of his premises by others. Nor is it a case of mere license or permission by the owner, without circumstances showing an invitation extended or an inducement, or in the language of some of the cases, an allurement held out to him as one of the general public. It is sometimes difficult to determine whether the circumstances make a case of invitation in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his Treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.'

"As each case must largely depend upon its special circumstances we shall not attempt to lay down a general rule upon the subject. It is quite sufficient to say that no difficulty of discrimination exists in the case before us. This is the case of a traveller, going upon a way which has been constructed and was maintained by a railroad company, in part for its own benefit and profit, to be used by all without distinction, who desired, for purposes of business, to pass to and from the company's wharf boat moored at an established landing upon a public navigable river. The deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had been, so to speak, dedicated by the owner. They were so situated, with reference to the river, and were so occupied and controlled by the company as not only to invite their use by the public, but in a sense, to compel those having business at the river landing to abandon such business, or in its prosecution, to pass over the route through the shed depot. It was therefore the plain duty of the company to take such precautions, from time to time, as ordinary care and prudence would suggest to be necessary for the safety of those who had occasion to use the premises for the purposes for which they had been appropriated by the company, and for which, with its knowledge and permission, it was commonly used by the public."

Compare *Parker v. Publishing Co.* (60 Me. 173), 31 Am. Rep. 262.

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(94 Ill. 357.)

Civil Damage Act — proximate cause — death.

An intoxicated person going home at night had to cross a railroad. Next morning he was found on the track killed by being run over by the cars. *Held*, that the intoxication was the proximate cause of his death, and the seller of the liquor which intoxicated him, and the owner of the premises where it was sold, were liable under the civil damage act, to his widow, for injury to her means of support. (See note, p. 240.)

ACTION under the civil damage act. The opinion states the case. The plaintiff had judgment below.

Osborn & Lillard and *J. H. Rowell*, for appellant.

Karr & Karr and *Newton B. Reed*, for appellee.

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SHELDON, J. On the night of May 6, 1876, James T. Crawford was killed by a train of cars on the track of the Chicago and Alton Railroad Company, between the city of Bloomington and the town of Normal, in this State.

Virginia F. Crawford, his widow, brought this action under the Dram Shop Act, to recover damages for injury to her means of support from such death, the declaration alleging it to have been caused in consequence of the intoxication of decedent, and the action being against certain keepers of dram shops in Bloomington as having furnished the liquor which caused the intoxication, and the owners of the buildings in which the liquors were sold, the statute giving the action severally or jointly against such persons.

The suit during its pendency having been dismissed as to all the defendants except Schroeder, the owner of one of the buildings, and Dwyer, the keeper of one other of the dram shops, a verdict and judgment were rendered against Schroeder and Dwyer for \$2,500, and Schroeder took an appeal to the Appellate Court for the Third District, where the judgment was affirmed, and from that judgment of the Appellate Court Schroeder appealed to this court.

On this appeal from the Appellate Court, where only questions of law are re-examined, there are but two of the assignments of error, as we regard, to be considered,—one, that the damages are too remote, the other, respecting instructions.

The facts appearing are that Sullivan kept a drinking saloon in the building owned by Schroeder; that decedent on the day of his death was at Sullivan's saloon in the forenoon from about nine to twelve o'clock; that he procured intoxicating liquor and was intoxicated there; and was there again at two or three o'clock in the afternoon; that from about twelve to three or four o'clock in the afternoon, with the above exception, he was at Dwyer's saloon, where he obtained intoxicating liquor and was intoxicated when there; that he was seen at another saloon as late as five o'clock, and was still intoxicated; that at ten o'clock at night he was seen intoxicated, and it was raining; that no more was seen of him, and nothing was known of the circumstances of his death, more than that about five o'clock the next morning his dead body was found upon the railroad track crushed and mangled, evidently having been run over by a passing train of cars. To reach his home from Bloomington, two railroad tracks had to be crossed.

It is contended on the part of appellant that the proximate cause of decedent's death was the train of cars ; that if his intoxication at the time contributed to his death, it was a remote cause, in respect of which there is no liability, and *Shugart v. Egan*, 83 Ill. 56 ; s. c., 25 Am. Rep. 359, is cited as sustaining this view. It was there held, where an intoxicated person had been assaulted and killed by a third party, that the seller of the intoxicating liquor was not liable in damages to the widow for the death. It was there said to be the common experience of mankind that the condition of one intoxicated invited protection against violence rather than attack, and that it was not a natural and probable result of intoxication that the person intoxicated should come to his death by the willful, criminal act of a third party. The present case is quite different. The death was not caused by the direct, willful and criminal act of a third party. It cannot be affirmed that it was not a natural and reasonable consequence of the intoxication that the person intoxicated, with two railroad tracks lying between him and his home, should in a dark night meet with injury or death upon a railroad track, from a running engine or train of cars — that it was not such a consequence as in the ordinary course of things might result. Instances of the very occurrence have come before this court. *Emory v. Addis*, 71 Ill. 273, was a like action with the present, where the death of the intoxicated person was caused by his being run over on a railroad track by a passing train, in the same manner as here, and a recovery of judgment by the plaintiff was sustained. The intoxication was held to be the proximate cause of the death.

The action is not a common-law action, depending for its maintenance upon common-law principles, but it is a statutory remedy and lies as given by the statute. The statute giving the action is very broad in its terms, declaring that "Every husband, wife, etc., who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person," shall have the right of action. If a person, because of being intoxicated, lies down upon, or falls on a railroad track and is unavoidably run over and killed by a passing train of cars, the result is in consequence of the intoxication. It is said there was here an intervening agency which caused the death, to wit: the train of cars ; that that was the proximate cause, and the intoxication but the remote cause, and that the proximate cause

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only is to be looked to. So it might be said where one from intoxication lies down and becomes frozen to death, or falls into the fire and is burned to death, or is drowned by a freshet, as in *Hackett v. Smelsley*, 77 Ill. 109, that the intervening agency of frost, fire and the freshet occasioned the death and was the proximate cause, and thus no liability under this statute. This would be construing away the statute in defeat of its purpose.

It was not the intention that the intoxicating liquor alone, of itself, exclusive of other agency, should do the whole injury. That would fall quite short of the measure of remedy intended to be given. The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning. Any fair reading of the enactment must be that in the instances above, as well as the present, the death would have been in consequence of the intoxication within the undoubted intendment of the statute.

We perceive no error in respect of instructions. The chief complaint is the refusal to charge that the jury should find for the defendants if the death of the decedent was produced by the carelessness of the railroad company, or if there was a failure of proof that it was not produced by the fault of the railroad company.

Without admitting that negligence on the part of the railroad company would bar a recovery, it is sufficient to say that there was no proof whatever as to any negligence of the company, and so no evidence upon which to base an instruction in that respect.

It is supposed that, as the declaration alleges that the death was produced without any fault on the part of the railroad company, it was necessary to prove the averment. But if no fault of the company was shown, it might be presumed there was none. The allegation, too, was not material, and so unnecessary to be proved. The ninth refused instruction asked by the defendant was substantially the same as the appellant's fifth refused instruction in *Roth v. Eppy*, 80 Ill. 288, which the court there held to have been properly refused.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WALKER, C. J. I am unable to concur in holding the owner of the property liable in this case.

Schroeder v. Crawford.

NOTE BY THE REPORTER. — In *Winspear v. Accident Ins. Co.*, 42 L. T. (N. S.) 900, a policy insured against "any personal injury caused by accidental external visible means, within the intention of the policy and its provisions, and the direct effect of such injury should occasion his death within three calendar months from the happening of such injury;" it being further provided that no claim should be made under the policy "for any injury from any accident unless such injury should be caused by some outward and visible means, of which proof satisfactory to the directors could be furnished, and that the insurance should not extend to * * * any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease, or any medical or surgical treatment or operation rendered necessary by disease; or to any death arising from disease, although such death may have been accelerated by accident." Whilst the policy was in force, W., in crossing and fording a stream or brook, was seized with an epileptic fit, and fell down in the said stream, and then and there, whilst suffering such fit, was drowned. He did not sustain any personal injury to occasion death other than drowning. *Held*, that a recovery could be had by his executors. KELLY, C. B., could "not bring himself to entertain a shadow of doubt in the matter." The inquiry was, what was the *causa causans*? "If there be a meaning in words, and if the English language admits of a statement with a plain and grammatical meaning of the cause of an individual's death, it is to my apprehension clear that here drowning was the cause, and the only cause, of the death of the insured. The drowning may have been occasioned by the deceased having falling down in the water from the fit of epilepsy, and that fit may have been occasioned by a constitutional habit of body, making it dangerous for him to expose his limbs to the action of cold water, the one cause preceding the other, and being what logicians call the *causa sine quâ non*, but for which the death would perhaps not have happened, but not being in the proper sense of the word the actual proximate cause of death. The real *causa causans* in this case was the influx of water into the deceased man's lungs, and the consequent stoppage of his breath, and so he was drowned. Any thing which led to that, such as his being, if he were, subject to epileptic fits, or being seized with a fit while crossing the stream, would be a *causa sine quâ non*. If he had not had the fit he probably would have crossed the stream in safety, but that does not make the fit the *causa causans*, the actual proximate cause of his death." The question then arose, was a death by drowning within the policy? On this point, the learned judge quoted from *Trew v. Ry. Passengers' Ass. Co.*, 6 H. & N. 839, where COCKBURN, C. J., said: "Mr. Lush ingeniously puts it, that to be within the policy, the death must be from some *vis major*, from something without; that where the cause is one that would produce immediate death without any outward lesion, it is not a case within the policy, and therefore that the policy does not apply to the case of a death by the action of water. If this be correct, the case of a man who fell from the top of a high house, or one who fell overboard from a ship, or a case of suffocation by fire, would not be within the policy. But we do not accede to this argument; and we think that a case of death by drowning is a case of death by accident within the meaning of the policy, for which the defendants are liable." HUDDLESTON, B., in the principal case was "not without considerable doubt," but "after some hesitation" coincided with the chief baron. He observed: "It cannot be said in this case that the injury was caused directly by the epileptic fit. It was caused by immersion in the water and the consequent suffocation which was the direct cause of the death, and therefore it does not come within the clause of the policy by which the directors seek to protect themselves in case of the insured's death arising from disease or from exhaustion consequent thereupon."

See *Kirchner v. Myers*, *post*.

Orrell v. People.

ORRELL V. PEOPLE.

(94 Ill. 456.)

Criminal law — burglary — stable.

A stable is a "building" within the statute of burglary.*

CONVICTION of burglary. The opinion states the case.

Moore & Warner, for plaintiffs in error.

E. S. Van Meter, State's attorney, and *William Fuller*, for people.

SCOTT, J. Henry J. Orrell was indicted at the December term, 1879, of the De Witt Circuit Court, jointly with Thomas Rea and Henry Russell, for the crime of burglary. The offense consisted in entering and taking from the stable of Sandusky Wilson, in the night time, a set of harness of the value of \$26. It appears Russell pleaded guilty, and Orrell and Rea having pleaded not guilty, on trial both of them were convicted, and sentenced to the penitentiary for a term of years. Orrell alone prosecutes this writ of error.

[Omitting immaterial matters.]

A point is made against the indictment, that it is averred "defendant broke and entered a stable," and that it contains no averment it was a "building." It is suggested such an averment is necessary, as a "stable" is not included in the statute in relation to burglary unless it comes under the general classification of "other buildings," and it is said that fact should not be presumed. A "stable," as that word is commonly used and understood, is the equivalent of "building," and is therefore fairly included in the statute defining burglary in that class of structures denominated "other buildings."

The judgment will be affirmed.

Judgment affirmed.

* See *State v. Bishop* (51 Vt. 287), 81 Am. Rep. 600.

WILMS V. JESS.

(94 Ill. 484.)

Mines — support of surface — superincumbent weight.

One who owns minerals and the right of mining in the land of another is bound to leave sufficient supports for the superincumbent soil in its natural state,* and in an action for injury by subsidence, if there are buildings on such soil, the burden is on him to show that the subsidence was caused by their weight.

ACTION for injury to surface of soil. The opinion states the case. The plaintiff had judgment below.

Palmer, Palmer & Ross, for appellant.

Patton & Lanphier, and *McGuire & Hamilton*, for appellee.

SCHOLFIELD, J. Appellee brought an action on the case against appellant and another, in the Circuit Court of Sangamon county, for injuries to appellee's premises, caused by the removal by the appellant and his co-defendant of the underlying *strata* of coal, without leaving sufficient support for the surface.

The entire title to the lot of ground involved in the litigation was originally in Jacob Bunn; but on the 29th day of March, 1870, he leased to the assignor of appellant and his co-defendant "the sole and exclusive right of boring, digging and otherwise prospecting for coal," in a large body of land, including this lot, and of "taking out and working the said coal, together with the right of way and surface of so much of the track as may be necessary for the economical use of the same." The lease contained, among others, this clause: "It is further understood and agreed, that the said party of the second part shall mine the coal in a workmanlike manner, no pillars to be withdrawn within six hundred (600) feet of the shaft, and that the entries giving access to the coal not mined at the termination of this lease shall be turned over to the party of the first part in as good condition as the nature of the mine will admit."

* See *Yandes v. Wright* (66 Ind. 819), 83 Am. Rep. 109; *Livingston v. Molingona Coal Co.* (49 Iowa, 889), 31 Am. Rep. 150.

Wilms v. Jessa.

On the 5th day of October, 1877, Burn, having previously sold, conveyed this lot to appellee, making this exception in the deed: "Except all coals and minerals of every description under the surface of said premises (which is hereby expressly reserved), and the right to take therefrom all coals and minerals, with the privilege of extending entries thereunder."

Appellee at once took possession of the lot and soon thereafter commenced making improvements thereon, and had dug a well, constructed a cistern, began the erection of a house which was estimated to cost some \$5,500, and progressed therewith until the brick-work was completed, the frame-work raised and sheeted ready for weather-boarding, and the roof and cupola completed, when the surface of the underlying soil suddenly subsided for the distance of some three feet, and thereby seriously damaged the house and destroyed the well and cistern.

This was caused by appellant and his co-defendant mining and removing the *strata* of coal underlying the lot.

The gist of the action as averred in the several counts of the declaration is, the mining and removal of the coal without leaving sufficient support for the surface.

Appellant and his co-defendant pleaded not guilty. The cause was submitted to a jury who returned a verdict finding the defendants guilty, and assessing the plaintiff's damages at \$1,000. The Circuit Court, after overruling motions for new trial and in arrest of judgment, rendered judgment upon this verdict, and appellant took the case, by appeal, to the Appellate Court for the third district, where the judgment of the Circuit Court was affirmed.

The present appeal is from that judgment of affirmance.

The lease under which appellant claims confers the right to work the mine and take out the coal, and as incident thereto, the use of usual and appropriate means therefor; and it also gives a right of way and surface use of so much of the superincumbent soil as is necessary for the economical and efficient working of the mine. It does not, however, assume to confer any right to destroy or injure or further burden the superincumbent soil.

Where the surface of land belongs to one and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. *Humphreys v. Brogden*, 12 Q. B. 743 (1 Eng. Law &

Eq. 241); *Harris v. Ryding*, 5 M. & W. 59; *Smart v. Morton*, 5 Ell. & Bl. 30.

But it is contended, appellant and his co-defendant were exonerated from protecting the surface, because the lease here stipulates that "no pillars shall be withdrawn within six hundred feet of the shaft," upon the principle that "having expressed some, the parties have expressed all the conditions by which they intend to be bound under that instrument."

By looking to the lease we think it quite clear this stipulation has relation to the mine only, and no reference whatever to the superincumbent soil. The whole clause relates to the manner of working the mine and the condition in which it shall be left. It requires that the mining shall be done in a workmanlike manner, that no pillars shall be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined at the termination of the lease, shall be turned over, etc., in good condition, etc., etc.—all for the obvious purpose of preserving the shaft and access to coal not mined.

No attempt is made to regulate the rights and obligations of the parties in respect of the superincumbent soil, further than to confer the right of way thereover, and the surface use to the extent necessary to an efficient and economical working of the mine, leaving them to be governed in other respects in reference thereto by the common law.

The rule is well settled, when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil. *Coleman v. Chadwick*, 8 Penn. St. 81; *Horner v. Watson*, 29 P. F. Smith, 251; s. c., 21 Am. Rep. 55; *Jones v. Wagner*, 10 P. F. Smith, 429, s. c., 5 Am. Rep. 385; *Harris v. Ryding*, *supra*; *Zinc Co. v. Franklinite Co.*, 13 N. J. Eq. 342; *Smart v. Morton*, *supra*.

And it is held, where a land-owner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power. *Hext v. Gill*, L. R., 7 Ch. App. 699.

But it is contended, this obligation to protect the superincumbent soil only extends to the soil in its natural state, and that no obligation rests on the owner of the subjacent strata to support additional

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buildings, in the absence of express stipulation to that effect. This is doubtless true, but "the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. Where the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful and renders the owners of the mines liable for all damages that result therefrom, as well to the buildings as to the land itself." Wood on Nuisance, § 201; *Brown v. Robins*, 4 Hurl. & Nor. 185; *Hamer v. Knowles*, 6 id. 450.

The act of removing all support from the superincumbent soil is, *prima facie*, the cause of its subsequently subsiding, but if the subsiding is, in fact, caused by the weight of buildings erected subsequent to the execution of the lease of the mine, this is in the nature of contributive negligence, and may be proved in defense. The authorities do not require that plaintiff's proof shall exclude that hypothesis in the first instance.

The finding of the appellate court that the judgment of the Circuit Court is sustained by the evidence, there being evidence tending to that end, relieves us from a discussion of the evidence.

We think the instructions given by the Circuit Court are substantially in harmony with the views herein expressed, and there is no error of law complained of in any other respect.

The judgment of the appellate court is affirmed.

Judgment affirmed.

EAGLE PACKET COMPANY V. DEFRIES.

(94 Ill. 598.)

Negligence — evidence of — falling of landing plank from steamboat.

When a steamboat is putting passengers ashore at a wharf, the fall of the landing plank, while a passenger is carefully walking over it, is presumptive evidence of negligence on the part of the steamboat proprietor.

ACTION for a personal injury sustained by plaintiff in disembarking from defendant's steamboat. The opinion states the point. The plaintiff had judgment below.

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Morris A. Locke and Dummer, Brown & Russell, for appellant.

Snedeker & Hamilton, for appellee.

DICKEY, J. From a careful examination of the evidence, we are satisfied the plaintiff was entitled to a verdict in her favor. There is nothing in the record tending to prove a want of ordinary care on her part, which could have contributed to her injury. It is, however, insisted there is an entire absence of proof of negligence on the part of defendant. This view of the case results from a misapprehension of the legal effect of the evidence introduced by the plaintiff. It was clearly the duty of defendant to provide means by which plaintiff could safely go from the boat to the wharf; and the fact that the stage-plank used for that purpose fell whilst plaintiff, in the exercise of due care, was walking over it, is *prima facie* evidence of negligence on the part of the defendant in the performance of that duty, and casts upon the defendant the burden of proving that the falling of the plank was the result of an accident for which defendant was not responsible. This position is sustained by the ruling of this court in *Pittsburg, Cincinnati and St. Louis Railway Co. v. Thompson*, 56 Ill. 138, and of the Supreme Court of the United States in *Railroad Co. v. Pollard*, 22 Wall. 342, and in *Stokes v. Saltonstall*, 13 Pet. 181. In the last-named case it is held that the upsetting of a stage-coach, by which a passenger is injured, is *prima facie* evidence of negligence on the part of the driver, and casts upon the proprietor the burden of showing the driver was in every respect qualified, and acted with reasonable skill and the utmost caution.

When, therefore, in the case at bar, it is shown the plaintiff has been injured by the falling of the stage-plank, the burden is cast upon the defendant to show this was caused by an accident which, by the exercise of ordinary care on the part of defendant's servants, could not have been avoided. It is true, the evidence tends to show the end of the boat was moved around by the wind, and this caused the stage-plank to fall; but it does not appear the boat was fastened to the wharf in any way, or that it could not have been so fastened as to have prevented its being moved by the wind. The evidence wholly fails to establish ordinary care on the part of the defendant to prevent the falling of the stage-plank.

[Omitting other matters.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

STATE V. BLOOM.

(68 Ind. 54.)

Criminal law — evidence of good character.

On the trial of an indictment for larceny, the prisoner's evidence of good character must be confined to his character for honesty and integrity.

I**NDICTMENT** for larceny. The opinion states the case. The prisoner was acquitted below.

***T. W. Woollen*, attorney-general, and *S. M. Hench*, prosecuting attorney, for the State.**

***S. E. Sinclair* and *H. C. Hanna, Jr.*, for appellee.**

WORDEN, J. The appellee was indicted in the court below, for larceny, and, upon trial, was acquitted.

On the trial, the defendant was permitted to prove, as part of her defense, and over the exception of the prosecuting attorney, that her general moral character or reputation, in the neighborhood in which she lived, was good, the prosecuting attorney insist-

ing that the evidence should be confined to the defendant's general reputation in the neighborhood in which she lived, for honesty and integrity.

The State brings the case here for the purpose of settling the question of law involved.

[Omitting a statutory consideration.]

The question involved must be decided, then, upon general principles of law, for we are aware of no statute which controls it. It may be observed that the terms "general character" and "general moral character" are frequently used in the books, not as embracing every trait of character, or one's character in every particular, but as excluding particular facts of conduct. Thus, a standard author says: "The inquiry, too, must be confined * * * to the general character of the prisoner, and must not condescend to particular facts." 1 Taylor's Ev., § 326.

General character is shown by general reputation, and not by the particular facts of one's life; but the general reputation may well be confined to the particular traits of character that are supposed to render, to some extent, the commission of the crime charged improbable. The author above quoted, in the same paragraph, says:

"In all cases, too, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him; as, for instance, if he be accused of theft, that he has been reputed an honest man; if of treason, a man of loyalty."

This seems to be the doctrine of all the books. Thus, in 1 Greenl. Ev., § 54, it is said, that, "in all cases, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him." And in the third volume of the same work, section 25, it is said that "The evidence, when admissible, ought to be restricted to the trait of character which is in issue; or as it is elsewhere expressed, ought to bear some analogy and reference to the nature of the charge; it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty; or on a trial for treason, to inquire into his character for honesty in his private dealings."

We make the following extract from the opinion of the Supreme Court of California, in the case of *People v. Fair*, 43 Cal. 137, 148. The court says:

“Mr. Phillips, in his work on Evidence, expresses the true rule upon this subject, and which will be found to accord with the current of judicial decisions, and the opinions of the text writers upon the law. He says: ‘On a charge of stealing it would be irrelevant and absurd to inquire into the prisoner’s loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which is alone the subject of inquiry. It would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question.’ Page 490.

“It is apparent that if such an inquiry must, upon objection by the prosecution, have been excluded for mere irrelevancy, had the prisoner sought to introduce it on her own behalf, the same rule should have rejected it when tendered by the prosecution itself.”

We deem it unnecessary to multiply authorities upon this point, but we may observe that it was said in the case of *Fletcher v. State*, 49 Ind. 124; s. c., 19 Am. Rep. 673, that “when the purpose was to inquire into the character of the defendant, the inquiry was generally limited to that trait of character which had some relevancy to the question in issue.”

We may observe, before closing this opinion, that if a defendant, when put upon trial for an alleged crime, has a right to prove his good character in all respects and in all its traits, without limitation to the traits supposed to render the commission of the crime improbable, and gives such evidence, it would seem to follow that the State would then have a right to attack that character in as broad a sense as that in which it was sustained by the evidence given by the defendant. The State would have the right, in other words, to disprove the case made by the defendant as to character in all its parts. Nothing occurs to us that the defendant may prove by way of defense, which the State may not disprove. Hence, if on the trial of a woman for larceny, she legally gives evidence of her general good character, without limitation, that evidence would include good character as to chastity, veracity, etc., as well as honesty. The State, it would seem, could then attack the case made by her in all its parts, and show that her general character for chastity,

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veracity, etc., as well as honesty, was bad. The law does not contemplate the raising of such irrelevant issues.

We are of opinion that the court erred in not limiting the defendant's evidence of character to her reputation for honesty and integrity.

The appeal is sustained, at the costs of the appellee.

Appeal sustained.

BURNS V. ANDERSON.

(68 Ind. 202.)

Interest — after maturity.

A note, providing for a conventional rate of interest, but omitting to provide for the rate of interest after maturity, draws the legal rate. (*See note, p. 253.*)

ACTION on a note. The opinion states the case. The plaintiff had judgment below, and appealed.

M. H. Kidd, for appellant.

SCOTT, J. This suit was commenced in the Wabash Circuit Court on the 22d day of November, 1877, against William and Rhoda Anderson, the appellees, to recover judgment on a note given by William Anderson and to foreclose a mortgage given by both to secure its payment. Rhoda was the wife of William. The complaint is in the usual form. The appellees answered the general denial, and the parties agreed that all matters of defense might be given in evidence under this answer. A jury was waived and the cause submitted to the court. There was a finding for the appellant in the sum of \$1,555.38. There was a motion for a new trial by the appellant, which was overruled on exception. The appellant then moved for a judgment bearing ten per cent interest, which was overruled and the appellant excepted to this ruling, and judgment was pronounced bearing six per cent interest. The evidence is in the record.

The appellant assigns, as errors, the overruling of his motion for

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a new trial, and the overruling of his motion for a judgment bearing ten per cent interest on the amount found due him.

The following is a copy of the note :

“ \$3,526.50.

WABASH, Ind., Oct. 23, 1873.

“Thirty-six months after date, I promise to pay to the order of Daniel Burns, three thousand five hundred and twenty-six dollars and fifty cents, with interest at ten per cent per annum, value received, without any relief whatever from valuation or appraisement laws.

“WILLIAM ANDERSON.”

The following are the facts substantially as sworn to by both parties :

Appellee William Anderson borrowed of appellant, September 20, 1856, \$200, and gave his note due one day after date, and agreed by parol to pay him twelve per cent interest. On the 15th day of March, 1859, the parties compounded the interest at twelve per cent due on this note, and added it to the principal, and appellee gave a note for the same. On August 16, 1861, the parties again compounded the interest due in the same way, and a renewal note was given for this and the principal. On the 3d day of July, 1861, appellant borrowed of appellee \$440 more, giving his note for \$500, appellee reserving twelve per cent interest for the year. On the 18th day of November, 1861, appellee's brother took up both these notes, and, incorporating the amounts with a debt of his own, gave his note for all. This note was renewed by the brother, August 16, 1867, and the interest compounded and charged at twelve per cent as before. On the 23d day of November, 1872, the debt of appellee was separated from that of his brother, and a new note given by appellee, William Anderson, including interest compounded at twelve per cent yearly as before. November 23, 1873, the interest was again added at twelve per cent and the note in suit given, which also included interest compounded annually at twelve per cent to maturity. All the notes given were due one day after date, except the one in suit, and silent as to interest. The interest was always compounded after due, except in the case of the note sued on, and time always given on both principal and interest.

Payments were made on these notes as follows : February 18, 1871, \$100. April 1, 1871, \$400. October 23, 1872, \$10.

This case is like the case of *Burns v. Anderson*, 68 Ind. 181, decided at the present term of this court, except that in that case the note did not specify any rate of interest, and in this case the note does provide for ten per cent per annum. The question as to the method of computing the interest was fully decided in that case, and what is said there applies to this case as to the method of computing interest up to the time of giving the note sued on in this case.

We are unable to tell the precise method adopted by the Circuit judge in computing the interest. But we presume that the interest was computed at six per cent up to the giving of the note sued on ; then ten per cent on the amount due at that time, until the maturity of the note, and six per cent after the maturity of the note, until the time the judgment was rendered ; and in fixing the rate of interest, the judgment should bear, the court applied the rule, that all judgments on contract should bear the same rate of interest which the contract is bearing at the time it is merged in the judgment.

Two questions are presented for our determination :

1. What rate of interest did the note bear after maturity ?
2. What rate of interest should have been specified in the judgment ?

The appellee promised to pay the appellant so much money, with ten per cent interest on a day certain. He violated his contract, and did not pay. The law in force at the time this promise was made, provided that for its violation the parties themselves might fix, in writing, the measure of damages, not however to exceed ten per cent per annum. In the absence of an agreement in writing, fixing the measure of damages, the law fixes the measure of damages, in such a case, at six per cent per annum. In this case the note did not provide what the rate of interest should be after maturity. The law therefore fixed the rate of interest, as a measure of damages, at six per cent per annum after the maturity of the note.

In the case of *Brewster v. Wakefield*, 22 How. 118, Mr. Chief Justice TANEY, in delivering the opinion of the court upon this precise question, uses the following language : " The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract." And further

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along in the opinion, he says : " Nor is there any thing in the character of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulations for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent per annum as a reasonable and fair compensation for the use of money ; and where a party desires to exact, from the necessities of the borrower, more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms ; for with such a claim, he must stand upon his bond."

This was, at the time, sustained by authority, and has been since followed by the Supreme Court of the United States in *Holden v. Freedman's Savings & Trust Co.*, 100 U. S. 72, and in our opinion, expresses the correct rule. The case of *Kilgore v. Powers*, 5 Blackf. 22, is expressly overruled on this point. We are not aware of any other cases, in this court, that have followed *Kilgore v. Powers*, *supra*. If there are any, they are also overruled.

[Omitting the other question.]

The judgment is affirmed, at the costs of the appellant.

Judgment affirmed.

NOTE BY THE REPORTER.—See to the same effect, *Briggs v. Winsmith*, 10 S. C. 133 ; s. c., 30 Am. Rep. 46, and note, 47. In the very recent case of *Union Institution for Savings v. Boston*, 23 Alb. L. J. 120, the court say that the statement in the opinion in *Brannon v. Hersell*, 112 Mass. 63, that " the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt," might well be modified so as to say that the interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured according to the intention manifested by the contract, by the standard thereby established."

In *Jersey City v. O'Callahan*, 12 Vroom, 349, in the New Jersey Court of Errors and Appeals, the point decided was, that where damages for breach of contract are to be assessed, the rate of interest will change as the statutory rate changes during the accruing of the damages, and Chief Justice BRASLEY remarked *obiter* :

" Interest proper arises whenever money is lent or forborne with an understanding, express or implied, that an equivalent shall be given for its use, and in such case the rate of interest agreed upon, or if none such be agreed upon, the rate then existing by law, is, in the absence of any new agreement, the rate to be paid until the return of the money. And this rate prevails notwithstanding any statutory change of the rate of interest during the *interim*. Thus, for example, if at the time of a loan, or of an agreement to forbear the payment of money for interest, the rate of interest as stipulated, or, in the absence of stipulation, as fixed by law, should be seven per cent, such percentage would be the rate payable until repayment of the principal sum, no matter when such principal sum might fall due, and notwithstanding any alteration in the legal rate before such repayment. It is quite understood that there is a contrariety of judicial decisions on this subject, but the rule just stated is considered to be justified by the inveterate and well-known practice with respect to the modes of loaning money in this State. Loans that are intended to run for long periods, and which are designed to stand as permanent investments, are usually,

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in form made payable after short terms of forbearance, so that as a question of intention, it is not a strained construction of such transactions to imply, after pay day has arrived, a renewal of the agreement with respect to interest, and that the loan is continued by mutual consent upon the original terms. Therefore, on loans and on forbearances, the original rate of interest will rule until the repayment of the money, unless the rate shall have been altered by a new agreement between the parties. In such cases, it is interest and not damages that is to be assessed."

The like doctrine was held in *Briscoe v. Kinealy*, St. Louis Court of Appeals, Mo. App.

In *Goodchap v. Roberts*, Eng. Ct. App., March 10, 1880, 42 L. T. (N. S.) 666, by an indenture of mortgage reciting an agreement for a loan of ten per cent, the mortgagor covenanted for payment of the principal at the expiration of twelve months, and for the payment of interest in the meantime at the rate of ten per cent per annum; but there was no covenant as to payment of interest in the event of the principal or any portion of it remaining unpaid after the day named for payment. The principal was not paid at the expiration of twelve months, but interest at ten per cent was paid for several years. After the death of the mortgagor a judgment was given for the administration of his estate, and the mortgagee proved as a creditor for the principal and interest. *Held*, that interest was recoverable only as damages, and ought to be limited to five per cent (the usual commercial value of money), that being the amount which a jury would be recommended to give in an action at law for non-payment of money on a day certain.

PATTON V. RANKIN.

(68 Ind. 245.)

Estate — tenancy by entireties — crops.

Crops raised on land owned by husband and wife together cannot be sold on execution against the husband alone.*

ACTION to enjoin execution sale. The opinion states the case. The plaintiff had judgment below.

B. W. Wilson and W. B. Wilson, for appellants.

G. B. Sleeth, J. W. Study, G. C. Clark and J. W. Brown, for appellees.

SCOTT, J. This action was brought by the appellees, against the appellants, to enjoin the sale of certain corn levied on by the appellant Hall, as sheriff, by virtue of an execution issued on a judgment in the Decatur Circuit Court, in favor of Josiah M. Collins, of whose estate the appellant Patton was the administrator.

It appears from the complaint, that Samuel Donnell was the

* See to same effect, *Marburg v. Cole* (49 Md. 402), 38 Am. Rep. 206, and note, 209

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father of the appellee Hester Rankin ; that Hester and James Rankin were husband and wife ; that on the 13th day of August, 1861, the father conveyed to his daughter and her husband certain land, which is described, jointly, giving them a title by entireties, as an advancement to his daughter ; that Hester and James Rankin and family lived on the land ; that a crop of corn was raised on the land by James Rankin and a minor son of James and Hester ; that on the 13th day of May, 1874, Collins, the intestate, recovered a judgment in the Decatur Circuit Court against James A. Rankin, the husband of Hester ; that Collins died, and Patton became the administrator of his estate ; that in July, 1876, Patton had an execution issued on the judgment in favor of Collins, his intestate, and that by virtue of this execution the corn was levied on by the appellant Hall, as the sheriff of Rush county ; that the sheriff had advertised the corn, and was about to sell the same on said execution. Prayer for a perpetual injunction.

The defendant demurred to the complaint for the want of sufficient facts. The demurrer was overruled and exception entered.

The precise question for our determination is whether a crop, raised by a husband upon land held by husband and wife by entireties, is subject to levy and sale on an execution against the husband.

This court has decided, that where land is deeded to husband and wife, the husband has not such an estate in the land as is subject to sale on execution. *Davis v. Clark*, 26 Ind. 424. It has also been decided by this court, that where land is conveyed to husband and wife, and held by them by entireties, the husband cannot convey any interest in such land by his separate deed. *Arnold v. Arnold*, 30 Ind. 305.

It has also been decided by this court, that where land is held by entireties by husband and wife, the husband cannot mortgage the land, and that a mortgage by the husband, on land thus held, the wife not joining therein, is void. *Chandler v. Cheney*, 37 Ind. 391.

It has been held by this court, that the rents and profits of land belonging to a married woman cannot be sold on execution against the husband without the consent of the wife. *Montgomery v. Hickman*, 62 Ind. 598.

We now decide that a crop, raised on land held by husband and wife by entireties, is held by them in the same manner and subject

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to the same law as the land itself ; and such crop is, therefore, not subject to levy and sale on an execution against the husband.

The demurrer to the complaint was properly overruled.

The judgment is affirmed, at the costs of the appellants.

Judgment affirmed.

SMITH V. BETTGER.

(68 Ind. 234.)

Payment — note of third person — burden of proof.

The taking of the negotiable note of a third person for an existing debt is *prima facie* payment, and the burden of proving an agreement to the contrary is on the creditor.*

ACTION on a note and mortgage. The opinion states the case. The defendant had judgment below.

B. K. Higginbotham, H. Gaddis, J. Claybaugh, Thompsons and J. U. Gorman, for appellant.

D. E. Straight and U. Z. Wiley, for appellees.

BIDDLE, J. Complaint on note and mortgage made by August Bettger to George Smith, and assigned by him to the appellant, for judgment and foreclosure. No question arises upon the complaint.

Appellees answered: 1. General denial ; 2. Payment ; 3. (The third paragraph is not in the record) ; 4. Special payment, as follows:

That on the 13th day of October, 1876, when said note became due, August Bettger made arrangements with Julian Strawn to pay the same when it should be presented, and when the plaintiff was ready to deliver a release of said mortgage, executed by the mortgagee ; and that he delivered to plaintiff an order on said Julian Strawn for the money in payment of said note ; that the said order was presented by the plaintiff on the 18th day of October, 1876, and accepted by him and paid by giving his draft on Smith, Howell &

* To same effect, *Gibson v. Tobey* (46 N. Y. 637), 7 Am. Rep. 397.

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Co., of Philadelphia, with whom he was doing business, and who at that time, and for several days after, honored his drafts and paid the same; that the plaintiff accepted said draft and delivered up the said release and mortgage, together with the order given by A. Bettger on said Strawn; that at the time of accepting said draft, the plaintiff might have had the money instead of the draft, if he had demanded the money of said Strawn; that said draft was not immediately forwarded to Smith, Howell & Co. for payment as plaintiff should have done, but on the contrary he withheld the same until the 31st day of October, 1876, at which time Smith, Howell & Co. ceased to honor the drafts of Julian Strawn; that the draft would have been honored, if it had been forwarded for payment without delay; that by reason of such delay, the plaintiff failed to get his money, and this was the result of his own negligence. Wherefore, etc.

A demurrer, alleging the insufficiency of the facts stated to constitute a defense, was overruled to the fourth paragraph of answer, and exceptions reserved. Reply of general denial to second and fourth paragraphs of answer. Trial by jury; verdict for appellee, the defendant below, and over a motion for a new trial, judgment on the verdict.

The appellant has reserved in the record, and presented in his brief, several questions, but we think they all fall within the single question: Is taking a bill of exchange by the creditor from the debtor for a previous debt, *prima facie*, a payment of the debt?

The rulings upon the pleadings and the evidence, and the instructions of the court, are all with the affirmative of this question. This seems to be so regarded by the counsel for the appellant, throughout their learned and forcible brief. We need not, therefore, particularly examine any other question. In reference to the question raised by overruling the demurrer to the fourth paragraph of answer, we think the court did not err. We must hold that paragraph sufficient. And if taking the bill of exchange, as shown by the evidence on behalf of the defense, was *prima facie* a payment of the debt set out in the complaint, then it is plain that no error was committed in reference to the evidence and instructions.

The leading facts, as proved by the evidence on behalf of the defense, may be stated substantially as follows:

The appellee, August Bettger, lived in the State of Illinois. Some time before the note sued on became due, he left money to

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pay it with Julian Strawn, at Goodland, in the State of Indiana. The appellant, having been made aware of this fact, sent his brother, Joseph F. Smith, with the note and a release of the mortgage, to collect the amount of the note, and upon its receipt to deliver the note and the release to Strawn. Smith carried the note and release to Strawn, and made known his business. Strawn told him that he had not the money convenient, and asked him if he would take a draft payable at Philadelphia. Smith said he would. Whereupon Strawn executed and delivered to Smith the following bill of exchange:

“ \$642.

GOODLAND, Ind., *October 20, 1876.*

“ At sight pay to the order of Henry L. Smith six hundred and forty-two dollars, value received, and charge the same to account of
JULIAN STRAWN.

“ To SMITH, HOWELL & Co., Philadelphia, Pa.

“ No. 354.”

There is no dispute about the amount of the bill of exchange being sufficient to discharge the debt. No agreement was made, and nothing said at the time, as to whether the bill of exchange was to be taken as payment of the debt or not. Joseph F. Smith sent the bill of exchange to the appellee at Rossville, Clinton county, Indiana, who received it there and indorsed it to the “ Indiana National Bank,” which bank indorsed it to the “ Central National Bank.” On the 31st of October, 1876, it was presented to the drawee, and protested for non-payment. On the 13th of November, 1876, the appellees were notified of the protest.

This brings us to the question in the case, upon which the authorities do not agree, nor does it seem possible to reconcile them. They are mainly divided into two lines,— the one maintaining the affirmative of the question, that is, that taking a promissory note governed by the law merchant, or a bill of exchange, for a debt, is a payment of the debt; and the other that it is not a payment, and is no defense to a suit upon the original debt. The courts of a majority of the States, we believe, and the courts of the United States, beginning with the case of *Clark v. Young*, 1 Cranch, 181, decided in 1803, maintain the negative of the question. While several other States maintain the affirmative, of which the earliest reported case we have found is that of *Thacher v. Dinsmore*, 5 Mass.

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1899; 4 Am. Dec. 61; but it was said in that case by Chief Justice PARSONS: "It has long been settled as law in this State, that a negotiable note, given in consideration of a simple contract debt due, is a discharge of the simple contract. This was decided before the revolution, in an action commenced by Warren, administrator of Wheelright."

The line of decisions which takes the negative of the question we are considering seems to have followed the old common-law notion—founded when the law merchant and negotiable public securities had scarcely any existence—that one unexecuted contract cannot be pleaded in bar of another unexecuted contract of the same degree, which is doubtless good law yet, except as to bills of exchange, promissory notes governed by the law merchant, and negotiable public securities; the opposite line of authorities seems to have accommodated itself to the law merchant and the transfer of negotiable public securities, and holds that acceptance of negotiable paper for a debt is a payment. It would not be profitable to cite the authorities on both sides, and to cite them upon one side only would be partial, as they would afford but a choice between them at last. Some of them make a distinction, in receiving negotiable paper, between a previous debt and a present debt created at the time the paper is taken, holding it to be a payment in the latter instance and not in the former, but we do not clearly perceive any difference in principle between them. If the debt existed at the time the paper is received in its discharge, it does not seem to us material whether it was created at the same time or had existed before.

In the midst of this conflict between the decisions of other courts, we must look to our own precedents for authority. By these we are constrained to hold:

1. That taking a promissory note not governed by the law merchant, by the creditor from his debtor for an existing debt, is not a payment of the debt, unless it is so agreed to be by the parties, and the onus of proving such agreement would lie upon the debtor.

2. That taking a bill of exchange, or a promissory note governed by the law merchant, by the creditor from his debtor, for an existing debt, is a payment of the debt, unless it is otherwise agreed by the parties, and the onus of proving such agreement would lie upon the creditor.

We think these rules are better than those which hold the oppo-

site doctrine. They seem to us to be more just. When the debtor gives a promissory note not governed by the law merchant for an existing debt, he cannot be subjected to the payment of the debt twice, for the payment of either the original debt or the note is a discharge of both; but when the debtor gives a bill of exchange or a promissory note governed by the law merchant, and it should pass into the hands of an innocent holder, he might be compelled to pay it, either as maker or indorser, notwithstanding he had previously paid the creditor the original debt. Under such a rule, unless the negotiable paper was held to be a payment, we do not see why the creditor could not collect his debt twice, once from his indorsee when he negotiated the paper, and once from the debtor on the original debt, and thus subject the debtor to the payment of his debt twice. The only way we see to avoid these consequences would be to compel the creditor at the time of trial, if he sued on the original debt, to produce, deliver up and cancel the negotiable paper received for the debt.

The business of the world is largely carried on by bills of exchange, or other negotiable securities. Bills of exchange are constantly passing from debtor to creditor, discharging debt after debt, and continually receiving additional security by indorsements. If they were not held as payments of the debts for which they were given or transferred, and suits would still lie upon such debts, the parties might be compelled to retrace their steps and undo all the business transactions they had performed, and thus be continually disturbing the commerce of the world. The creditor has his remedy on the bill of exchange or other negotiable security which he takes for his debt, and it seems to us it should be his only remedy. It is at his option to keep his debt or take the bill of exchange or other negotiable security for it, and he should choose between them, and not be allowed to hold them both. And we think this view is more in accordance with the custom of merchants, and better serves the great interests of civilization than would the opposite practice. When the manufacturer sells his commodities to the merchant, to be shipped to a distant region, or perhaps to another country, and takes a bill of exchange from the merchant, either as maker or indorser, for his goods, he does not rely upon the original debt, but upon the bill of exchange with which he discharges his debt to the producer, who may perhaps live in another country. Thus the bill of exchange passes around

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the world, constantly performing its office between debtor and creditor, until it is cancelled by payment at the counter of the drawee, and the debts which it has answered are extinguished forever. If throughout this course, and during this time, each party to the bill, who is necessarily and alternately creditor and debtor, should be bound for his original indebtedness, and also upon the bill of exchange, either as maker or indorser, it would very much embarrass commercial relations, and render the rights of debtors and creditors extremely insecure.

The first decision we have in our reports touching the question under consideration is the case of *Pitzer v. Harmon*, 8 Blackf. 112, wherein it was held that the discharge of a promissory note by a surety by giving his own note, not negotiable by the law merchant, and which he has not paid, does not authorize him to sue his principal for money to his use. The same principle was held in *Bennett v. Buchanan*, 3 Ind. 47. The same in *Judah v. Potter*, 18 id. 224. See, also, *Romine v. Romine*, 59 id. 346. These cases strongly imply that if the note so taken for the debt was governed by the law merchant, it would amount to a payment.

The following cases hold that a promissory note taken upon a debt, with the agreement of the parties that it shall be received as payment, will amount to a payment of the debt. *Tyner v. Stoops*, 11 Ind. 22; *Stevens v. Anderson*, 30 id. 391; *Maxwell v. Day*, 45 id. 509; *White v. Miller*, 47 id. 385.

The case of *White v. Carlton*, 52 Ind. 371, holds that "The satisfaction of a debt by a surety by giving his own note, governed by the law merchant, to the creditor, is such a payment as will authorize such surety to sue a co-surety for contribution." In the case of *Alford v. Baker*, 53 Ind. 279, it was held that "The giving of a promissory note governed by the law merchant for a pre-existing indebtedness of the maker to the payee will discharge the debt, unless it is shown that the parties did not intend it to have that effect; but the giving of a promissory note not governed by the law merchant for such a debt does not operate as a payment thereof, unless it be so expressly stipulated between the parties." This case is followed by the following cases: *Hill v. Sleeper*, 58 Ind. 221, and *Bristol Manufacturing, etc., Co. v. Probasco*, 64 id. 406.*

In the following cases it is held that "Where a builder executes to the material man a promissory note payable in bank, for a bal-

*But see *Nightingale v. Chaffee* (11 R. L. 609), 23 Am. Rep. 531.—REP.

ance due for materials furnished, such a note will operate as a *prima facie* payment of the account." *Hill v. Sloan*, 59 Ind. 181; *Schneider v. Kolthoff*, 59 id. 568.

With these authorities before us, we must hold to the affirmative of the question under consideration; nor, as at present advised, would we adopt the opposite rule if the question was still open.

The judgment is affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BIDDLE, J. The counsel for appellant have filed a long and ardent brief to convince us of two propositions:

1. That negotiable paper taken in payment of a debt does not discharge the debt unless the paper is made by the debtor; and
2. That unless the debt is upon simple contract, taking negotiable paper will not discharge the debt at all.

The learned counsel have not furnished either text or case in support of the first proposition. They have cited several cases wherein it was held that a negotiable note made by the debtor and received by the creditor was a payment of the debt; but they have furnished us with no case wherein it was held that the debtor and the maker of the negotiable paper must be the same person, or the debt will not be discharged. A single bill of exchange, after it has been indorsed by the payee, and thus made negotiable by delivery, will pay debt after debt, to any number, before it falls due, either by additional indorsements or by passing it from hand to hand, long after the parties have lost all knowledge of the maker and his debt, except his name to the bill. Bills of exchange are often made where no debt exists between the maker and the payee; often made, indeed, expressly to pay the debt of the payee to a third person, and not the debt of the maker to the payee. Such bills, when once made negotiable by delivery, and put in circulation, will pay just as many debts as there are debtors who pass them, and creditors who receive them, before they are due. These are the qualities of bills of exchange, which give them their peculiar character and their great usefulness in the commerce of the world. The rule contended for by the counsel would effectually put a stop to the use of commercial paper, except as between original debtors and original creditors who made and received the paper; indeed, it would rob it of every quality which constitutes it commercial paper.

As to the second proposition, that the debt paid by a bill of ex-

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change must be a simple contract, or it will not be discharged. The plainest, and therefore the best, definition of simple contracts that we know of is given by Mr. Addison, as follows:

“Parol or simple contracts are contracts which are either made by word of mouth, or are inferred from the silent language of men’s conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered, and cannot be enforced unless they are founded upon some good or valuable consideration.” 1 Add. on Cont., § 2.

Any of the text-books will give substantially the same definition of simple contracts.

Promissory notes and bills of exchange are simple contracts, and differ in nothing from oral contracts, except that the words are fixed by writing, and can by that means be passed all over the world, and be easily proved. A promissory note secured by a mortgage on real estate does not cease to be a simple contract; the note is the debt, not the mortgage; and the payment of the note effectually discharges the mortgage. Any kind of a debt may be paid by a bill of exchange made by any person, whenever the debtor delivers it, if negotiable, or if not, indorses it to the creditor, before it is due, and the debt will thereby be discharged. The statute expressly enacts that “An agreement in writing, without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.” § 273 of the Code.

The petition is overruled.

Overruled.

STATE V. BEAL.

(68 Ind. 345.)

Criminal law — evidence — prisoner as witness — impeachment.

Where a prisoner testifies in his own behalf on the trial of an indictment, his character for truth may be impeached.*

INDICTMENT for unlawfully selling intoxicating liquor. The opinion states the point. The prisoner was acquitted below.

* See *People v. Crapo* (76 N. Y. 288), 32 Am. Rep. 302.

A. E. Steele, prosecuting attorney, and *T. W. Woollen*, attorney-general, for the State.

NIBLACK, J. The appellee, John A. Beal, was indicted in the court below for selling intoxicating liquor, without a license, in a quantity less than a quart at a time, and upon a trial before a jury was acquitted of the offense with which he was thus charged.

Upon the trial, and after the evidence in chief for the State had been introduced, the appellee offered himself as a witness and testified in his own behalf. The State thereupon, by way of rebuttal, and for the purpose of impeaching the credibility of the appellee as a witness, introduced one Michael Frash, a competent witness, to whom the prosecuting attorney propounded a question as follows: "Are you acquainted with the general character of John A. Beal, defendant, in the community in which he lives, for truth and veracity?" To this question the appellee objected, and the court sustained his objection, refusing to permit the witness, Frash, to answer the question. The State excepted, and reserved the question arising upon the ruling of the court as above set forth. This appeal is prosecuted by the State upon the question thus reserved.

Where a defendant in a criminal cause elects to testify in his own behalf, he occupies the position of both defendant and witness, and assumes the rights, privileges and disabilities which respectively attach to both these relations to the cause. By electing to testify, he forfeits no right which has already attached to his character as defendant, but simply in addition thereto becomes also a witness in the cause. In his capacity as a witness, he testifies under the same general rules which govern other witnesses in criminal causes. His general moral character cannot be attacked for the purpose of his impeachment, but his character for truth may. *State v. Bloom*, 68 Ind. 54.

This was a construction given to the law allowing defendants to testify in criminal cases, in the case of *Fletcher v. State*, 49 Ind. 124; s. c., 19 Am. Rep. 673, and such we believe to be the true construction of that law as applicable to cases like the one before us.

It is the common-law right of a party in a criminal as well as in a civil cause, to attack the character of an opposing witness for truth, and this right has in no manner been abridged by statute. To refuse to allow the character of a defendant, when a witness, to be thus attacked, would afford him an advantage not enjoyed by

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other witnesses, and clearly not contemplated by any statute of this State.

We are consequently of the opinion that the court erred in its refusal to permit the question set out as above to be answered by the witness to whom it was addressed.

The appeal is sustained, at the cost of the appellee.

Appeal sustained.

DAVENPORT V. FOULKE.

(68 Ind. 382.)

Mortgage — of stock in trade — effect as to creditors.

A mortgage of a stock of goods, such as are usually kept for sale in the particular trade of the mortgagor, with a provision that the mortgagor may retain possession and use and enjoy the mortgaged property, is void on its face as to other creditors of the mortgagor; and where the mortgagee knowingly allows the mortgagor to sell the goods and appropriate the proceeds to his own benefit, the mortgage will be void as to such other creditors, independent of any such provision.*

FORECLOSURE of chattel mortgage. The opinion states the case. The plaintiff had judgment below.

C. B. Walker and S. A. Forkner, for appellants.

J. P. Siddall and W. D. Foulke, for appellee.

NIBLACK, J. The complaint in this case averred that on the 6th day of July, 1875, the defendant, John F. Davenport, executed two promissory notes for three hundred and twenty-five dollars each to plaintiff, John T. Foulke, payable one in one year and the other in two years from date; that to secure the payment of said notes, the said Davenport executed to the plaintiff a chattel mortgage upon a fire-proof combination lock safe, certain show cases, trays, fixtures and tools, in a silversmith shop and jewelry store, together with many other miscellaneous articles consisting of merchandise pertaining to the business of a silversmith and jeweler,

* See *Frankhouser v. Ellet* (22 Kans. 127), 81 Am. Rep. 171, and note, 173.

articles which were such as are commonly in daily and permanent use in a silversmith shop and jewelry store combined, and not ordinarily for sale, we think the mortgage was *prima facie* valid. As to the articles last named, the reservation of the right to the mortgagor to use and enjoy them until default did not necessarily carry with it by implication the right of the mortgagor to sell and convert such articles to his own use.

The mortgage being valid on its face as to a portion of the mortgaged property, the court did right in overruling the demurrer to the complaint.

The third paragraph of the answer of Dozier and others, to which a demurrer was sustained, was substantially as follows :

That after the execution of the mortgage, the said Gillett and Jennison, being wholesale dealers, resident in the city of Indianapolis, in this State, and having no actual knowledge of such mortgage, sold to Davenport goods, wares and merchandise on credit to the aggregate sum of nearly nine hundred dollars, for which they obtained judgment against the said Davenport, and levied an execution on said mortgaged property ; that to secure the payment of their judgment, they, the said Gillett and Jennison, were compelled to purchase such property, and to pay off prior execution liens upon the same, all of which was done with the knowledge of the plaintiff; that after the execution of the mortgage, the said Davenport retained possession of the mortgaged property, and with the knowledge and consent of the plaintiff, kept said property in his store exposed to sale, and sold portions of the same every day, applying the proceeds to his own private use and benefit, and not to the payment of the debt secured by the mortgage. Wherefore it was claimed that the mortgage set out in the complaint was fraudulent and void as to the said Gillett and Jennison, as well as to the said Dozier.

Herman on Chattel Mortgages, at page 235, says:

“ If, by any arrangement, express or implied, the mortgagee allows the mortgagor to continue in the sale of the mortgaged goods at retail, for his own benefit, the mortgage will be unavailing against a judgment creditor of the mortgagor, and such arrangement or permission may be shown by circumstances. It is not the simple fact of possession by a mortgagor that will avoid the mortgage, but it is the possession with the power of sale which defeats the instrument, and the effect will be the same, although neither expressed nor nec-

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essarily implied from its terms. If the right to possession and power of sale in the mortgagor appear upon the face of the instrument, it will be a fraud in law, but if it do not appear upon its face, but in evidence at the trial, it will be fraudulent in fact."

What is thus said by Herman is also well sustained by authority. *Ogden v. Stewart*, 29 Ill. 122; *Horton v. Williams*, 21 Minn. 187; *State v. Tasker*, *supra*.

The facts set up in the third paragraph of answer in this case amount, as we construe them, to an allegation that the plaintiff had waived all right of lien on the mortgaged property, and that by reason of such waiver, such property had, in good faith and for a valuable consideration, passed into the hands of other creditors of Davenport.

As thus construed, and in the light of the authorities lastly above cited, we are of the opinion that this third paragraph of answer was well pleaded, and was consequently erroneously held bad upon demurrer.

For this error the judgment will have to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceeding not inconsistent with this opinion.

Judgment reversed and cause remanded.

SMOCK V. PIERSON.

(68 Ind. 405.)

Negotiable instrument — consideration — good-will.

The sale of the good-will of a business is a valid consideration for a note, although the business subsequently proves unsuccessful.

ACTION on a note. The opinion states the case. The plaintiff had judgment below.

D. V. Burns, for appellants.

C. W. Smith and *R. O. Hawkins*, for appellee.

NIBLACK, J. The action in this case was by Charles C. Pierson as executor of the last will of Ebenezer Smith, deceased, against

William C. Smock and Daniel M. Ransdell, upon a promissory note, payable to the testator, for \$428.55. The defendants answered that the note was given without any good or valuable consideration, to which the plaintiff replied in denial. Trial by the court at Special Term ; finding and judgment for the plaintiff. By a motion for a new trial, interposed at the proper time, the defendants raised the question of the sufficiency of the evidence to sustain the finding. Upon an appeal to the General Term, the judgment at Special Term was affirmed. The appellants contend that the finding of the court was contrary to the evidence, and that is the only reason urged for a reversal of the judgment below.

It was shown by the evidence that the appellants and the testator, Smith, entered into a partnership for the purchase and sale of real estate on commission, on the 30th day of April, 1873, under the firm name of Smock, Smith & Ransdell ; that the firm continued in business in the city of Indianapolis until the 11th day of October, 1873, when it was dissolved by mutual consent, Smith retiring, and Smock and Ransdell, the appellants, continuing the business for a year or more afterward; that during the existence of the firm, its place of business was known as "The Real Estate Exchange," and real estate men gathered there largely, making it a sort of "head-quarters" to talk over real estate matters; that the profits of the firm while in business amounted to about \$15,500, but that after the withdrawal of Smith, the appellants did not probably make expenses.

Melville Strong, a witness introduced on behalf of the appellants, testified : "I was a partner with the deceased and Mr. Pierson, engaged in selling dental goods, during the time Mr. Smith was a member of the firm of Smock, Smith & Ransdell; I and Mr. Pierson shared in the profits realized by Mr. Smith on that business; Mr. Smith died June 16, 1874; I was present when the note sued on was executed; heard the conversation; my impression from the conversation is, that it was given for Mr. Smith's interest in the goodwill of the real estate business of Smock, Smith & Ransdell; they were engaged in buying and selling real estate on commission; Mr. Smith got his share of all the fees and commissions earned by the firm up to the time of the execution of the note; the firm was dissolved at the time the note was executed; Mr. Smith had been away for some time before on account of his ill health, and had been rendering no service to the firm; at the time he was sick with an

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incurable disease, and was not able to perform his duties as a member of the firm of Smock, Smith & Ransdell; his health was not sufficient to enable him to discharge the duties of an agent in buying and selling real estate; there were three notes executed at the time, aggregating \$1,000, for the same consideration; Mr. Pierson got one, I got one, and the third is the one sued on; the note was not given for office furniture, nor earned, or partially earned, commissions, or any thing of that kind, but simply for good-will, as I understood from the conversation of the parties; I remember only that the conversation was about good-will; I do not remember what, if any thing, was said about Smith withdrawing from the firm."

The appellants, in answer to interrogatories addressed to them, stated in substance, that the deceased was not willing to take his share of the profits simply, but that knowing the fatal character of his sickness and his inability to perform further labor, and to humor him merely, and fearing that a refusal on their part would make him physically worse, they executed the note sued on and the two others referred to by Strong.

Several other witnesses, familiar with the real estate business, testified that the financial revulsion of September, 1873, practically destroyed all trade in real estate in Indianapolis, and that, for that and other reasons growing out of the peculiar nature of the business, the good-will claimed to have been sold by the deceased to the appellants was of no value whatever. There was evidence, however, tending to show that at the time of the execution of the note in suit, there was a very general impression amongst dealers in real estate about Indianapolis, that there would be, within a few months at the farthest, a favorable reaction in their line of business. This, we think, affords a fair synopsis of the evidence bearing upon the consideration for which the note described in the complaint was given.

The good-will of a trade or business was tersely called by Lord ELDON "the probability that the old customers will resort to the old place." This probability results from an established business at a particular place, indicating to the public where and in what manner it is carried on. It is well settled that the "good-will" of a business, like a trade-mark, is a species of property subject to sale by the proprietor, and which may be sold by order of court. 1 Pars. on Cont. 153; *Glen and Hall Manufacturing Co. v. Hall*,

61 N. Y. 226 ; s. c., 19 Am. Rep. 278; *Buckingham v. Waters*, 14 Cal. 146 ; Abb. Law Dict., title "Good-Will."

In estimating the value of a thing as the consideration for a promise, there is a manifest distinction between property of a certain and determinate value, and things which have but a contingent and indeterminate value. But in any event, mere inadequacy of consideration is not sufficient to defeat a promise. It is sufficient that the consideration shall be of some value. It may only be of slight value, or such as could be of value to the party promising. 1 Chitty on Cont. 29.

Where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say that he got no consideration. *Baker v. Roberts*, 14 Ind. 552.

In the case at bar, there was no pretense of fraud or concealment on the part of Smith. The appellants had every opportunity of understanding the condition of their firm's business, and in that respect Smith certainly had no advantage of them. Up to the time when Smith retired, the firm had been successful in the establishment of a good business, and in attracting the attention of persons dealing in real estate. It was quite apparent from the evidence, that the appellants desired to continue in the business thus seemingly established by the firm. It was equally apparent that, for reasons satisfactory to themselves, they wished to get Smith out of the firm, and to do so in such a way as would work no disturbance in their business, and would, at the same time, continue to them the "good-will" which the firm had enjoyed up to that time. To accomplish these objects, they agreed to give Smith and those interested with him one thousand dollars in addition to the amount he was entitled to receive as his share of the profits from their joint business. The promise thus made was a binding promise upon the appellants, without reference to whether the arrangement would prove to be a profitable one to them or not. For better or for worse, they got what they bargained for, and they now have no lawful reason to complain.

If their expectations as to future business were not realized, that was a misfortune for which Smith was not in any manner legally responsible. That circumstance did not even tend to show a want of consideration for the note in controversy, when it was given.

We are therefore of the opinion that the appellants' defense

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was not made out by the evidence, and that consequently the court below at special term did not err in its refusal to grant the appellants a new trial.

The judgment at General Term is affirmed, at the costs of the appellants.

Judgment affirmed.

[Petition for a rehearing overruled.]

WATKINS V. STATE.

(68 Ind. 427.)

Criminal law — bar — previous conviction fraudulently procured by offender.

Where one who had committed an assault and battery procured himself to be complained of before a justice of the peace, and submitted to a trifling fine imposed by the justice, with the design of avoiding a subsequent complaint by the person assaulted, and a possibly severer punishment, such conviction is no bar to a subsequent indictment.

CONVICTION of assault and battery. The opinion states the case.

C. A. Buskirk, for appellant.

T. W. Woollen, attorney-general, and *W. H. Trippett*, prosecuting attorney, for the State.

Howk, C. J. This was a prosecution against the appellant, upon affidavit and information filed in the Circuit Court, on the 10th day of April, 1879, for an assault and battery alleged to have been by him committed on the 16th day of February, 1879, at Gibson county, on one Lenora Watkins.

To the information the appellant answered by a special plea in bar, setting up his former conviction of and for the same offense, by and before a justice of the peace of Gibson county, on the 5th day of April, 1879. To this special plea or answer, the State, by its attorney, replied in two paragraphs, to wit: 1. A general denial; and 2. A special reply.

The appellant demurred to the special reply, for the alleged in-

sufficiency of the facts therein to constitute a reply, which demurrer was overruled by the court, and to this ruling the appellant excepted.

On arraignment the appellant's plea was that he was not guilty, and by consent, the issues joined were tried by the court, and a finding was thereon made for the State, that the appellant was guilty as charged, and assessing his fine in the sum of five dollars; and judgment was rendered accordingly.

The only error assigned by the appellant, in this court, is the decision of the Circuit Court in overruling his demurrer to the second reply of the State to his special plea or answer. In this second reply, the State alleged, in substance, that the said conviction and judgment before the said justice of the peace, as set out and averred in the appellant's plea in bar, were procured by the fraud of the appellant, in this, that the appellant, on the 5th day of April, 1879, being then and there the son of one Purnell Watkins, and residing with and at the home of said Purnell Watkins, requested and procured him, the said Purnell, to make the affidavit mentioned in said plea in bar; and the appellant and said Purnell Watkins then and there agreeing and colluding for the purpose of keeping said offense, charged in said affidavit, from being prosecuted in good faith, and from being prosecuted in the Gibson Circuit Court, and for the purpose of defeating the ends of justice by procuring a low and inadequate penalty to be assessed against the appellant for said offense, went together before said justice on said day, and then and there, and in collusion with the appellant, and at his special instance, request, desire and wish, said Purnell fraudulently made and filed the said affidavit, and that after the formal issuing of a warrant by said justice, and the formal arrest of the appellant on said warrant, thereupon the appellant plead guilty to the charge contained in said affidavit, and the said justice thereupon rendered judgment, assessing a fine against the appellant for said offense in the small sum of five dollars, and being the same judgment mentioned in said plea in bar; that in the making of the said affidavit and the filing thereof, and in the pretended trial as aforesaid, the State of Indiana was not then and there represented and was no party to said judgment; that the fine assessed against the appellant in said judgment was wholly inadequate and too low for the grave and particular offense charged in said affidavit and the information herein; that said offense was in the appellant's beating Lenora

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Watkins, who was then and there the appellant's wife, striking her, the said Lenora, with a ramrod on her back and shoulders eight or ten times, with great severity, and then and there and thereby bruising her flesh; that the said beating and striking were then and there done in great anger and malice, and without any provocation whatever; that at the time the appellant requested the said Purnell Watkins to make the affidavit as aforesaid, and at the time of the filing of said affidavit and of the rendition of said judgment thereon, and all the time from the time of the commission of said offense, as charged in the information herein, up to the time of the rendition of said judgment, the appellant, as well as the said Purnell Watkins, believed, and had good reason to believe, that the said Lenora would institute a prosecution against him, the appellant, for said offense; and it was for the purpose of avoiding the effect of such a prosecution, begun and instituted by said Lenora and at her instance, that the appellant procured the said Purnell Watkins to institute said proceedings before said justice; and this the State, by its attorney, was ready to verify. Wherefore, etc.

It seems to us that the court committed no error in overruling the appellant's demurrer to this special reply, for the facts alleged therein, if true, and as they are well pleaded the demurrer admits them to be true, show, beyond all question or room for doubt, that the proceedings before the justice were instituted, and his judgment thereon was obtained against the appellant, by his own procurement, with the fraudulent intent and purpose to defeat and bar thereby a prosecution in good faith by the injured party. It can hardly be believed that any man would in good faith institute a criminal prosecution against his own son, for the purpose either of vindicating the majesty of the law, or of securing the just punishment of the guilty. The law on the subject under consideration is thus stated in section 1010 of 1 Bishop on Criminal Law:

"But sometimes a man, conscious of guilt, procures proceedings against himself, and suffers a slight punishment, thinking thereby to bar a prosecution carried on in good faith. In such a case, if the first proceeding is really managed by himself, either directly or through the agency of another, he is, while thus holding his fate in his own hand, in no jeopardy; the plaintiff State is no party in fact, but only such in name; the judge is imposed upon indeed, yet in point of law adjudicates nothing; 'all is a mere puppet-show,

and every wire moved by the defendant himself.' The judgment therefore is a nullity, and is no bar to a real prosecution."

In the case of *Commonwealth v. Dascom*, 111 Mass. 404, the doctrine was fully sanctioned and approved, that where a person has fraudulently procured himself to be complained of before a justice of the peace, for an assault and battery, and to be arrested on a warrant, and has voluntarily submitted to a conviction on such complaint, for the purpose of avoiding the effect of a subsequent complaint made by the injured party, which he believed or had reason to believe would be made against him, such conviction, thus procured for such fraudulent purpose, would be no bar to a subsequent indictment for the same offense. To the same effect are the following cases: *Commonwealth v. Alderman*, 4 Mass. 477; *State v. Little*, 1 N. H. 257; *Commonwealth v. Jackson*, 2 Va. Cas. 501; *State v. Epps*, 4 Sneed, 552; *State v. Green*, 16 Iowa, 239; *State v. Atkinson*, 9 Humph. 677; *State v. Lowry*, 1 Swan, 34; *State v. Clenny*, 1 Head, 270; *State v. Colvin*, 11 Humph. 599; *State v. Yarbrough*, 1 Hawks, 78.

The appellant's counsel seems to rely in argument upon the law as stated in the concluding sentence of said section 1010, in 1 Bishop on Criminal Law, 5th ed., as follows:

"It would seem, however, that here, if the legal penalty was an exact and certain one, and the person thus carrying on the cause against himself had actually borne it in full, not merely in part, the State would have suffered nothing, and so the judgment would not be deemed in law fraudulent."

Conceding that the sentence quoted contains a correct statement of the law applicable to the case mentioned therein, as perhaps it does, it seems to us that the doctrine therein enunciated would not apply to the case now before us. For under the statute of this State, the legal penalty for an assault and battery is a fine in any sum "not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months." 2 R. S. 1876, p. 459, § 7.

It cannot be said, therefore, that the legal penalty for an assault and battery is in this State an exact and certain one; nor can it be said, upon the facts alleged in the second reply in this case, that the appellant had actually borne such legal penalty in full.

The appellant's demurrer to the special reply was correctly overruled.

The judgment is affirmed at the appellant's costs.

Judgment affirmed.

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TOLEDO, WABASH AND WESTERN RAILWAY CO. v. WRIGHT.

(68 Ind. 586.)

Carrier of passengers — ejection for non-payment of fare.

A railway company may lawfully make and enforce a rule that passengers not procuring tickets before entering a train shall pay a greater specified rate of fare, and passengers are bound to take notice of and conform to such rule.

A statute providing that if any railway passenger shall refuse to pay his fare, he may be ejected at any usual stopping-place, does not prohibit his ejection at any other safe point. (*See note, p. 284.*)

ACTION of damages. The opinion states the case. The plaintiff had judgment below.

W. Z. Stuart, C. B. Stuart, and T. A. Stuart, for appellant. •

W. H. Trammel, for appellee.

Howk, C. J. This was a suit by the appellee against the appellant, as a common carrier of passengers over its railroad, for hire, to recover damages for certain alleged breaches of its duty, as such common carrier. There were three paragraphs in the appellee's complaint, in each of which there was a general statement that at the date mentioned, and between the places named therein, the appellant was such common carrier of passengers for hire over its line of railway.

In the first paragraph of his complaint, the appellee alleged, in substance, that on the 21st day of August, 1873, he entered one of the appellant's passenger cars, at the town of Lagro, in Wabash county, for the purpose of being carried by the appellant in said car, as a passenger from the said town of Lagro to the town of Huntington, in Huntington county, Indiana; that the appellant, "without any lawful cause, indignantly, insultingly, cunningly and maliciously, and purposely, extorted a greater amount of money" from the appellee, as a passenger, than was the usual and customary fare of passengers between the above-named places charged by the appellant, to the appellee's damage in the sum of one hundred dollars. Wherefore, etc.

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In the second paragraph of his complaint, the appellee further alleged, in substance, that on or about the 27th day of August, 1873, he took passage upon one of the appellant's cars, at the town of Wabash, for the purpose of being carried by the appellant in said car from said town of Wabash to the said town of Lagro, as a passenger on said railroad; that the appellant "unlawfully, cunningly and maliciously, and purposely extorted" from the appellee a greater amount of money than was the usual and customary fare of the appellant for the carrying of passengers between the above-named places, to the appellee's damage in the sum of one hundred dollars. Wherefore, etc.

In the third paragraph of his complaint, the appellee alleged, in substance, that on or about the 28th day of August, 1873, the appellee entered into one of the appellant's passenger cars, at the town of Antioch, for the purpose of being carried in said car, by the appellant, from said town of Antioch to said town of Lagro; that he so entered, with the appellant's knowledge and assent, for the purpose aforesaid, and then and there became and was a passenger on board the appellant's car; that after the appellant had carried the appellee, as such passenger, about two miles, in said car, upon its railroad, toward said town of Lagro, the appellant, without any lawful cause, with force and violence at a point other than a usual stopping place for the appellant, and not near any dwelling-house, ejected and turned the appellee out of and from said car, and then and there insultingly refused to carry him further, to the appellee's damage in the sum of forty-eight hundred dollars. Wherefore, etc.

To the appellee's complaint the appellants answered in two paragraphs, in substance as follows:

1. A general denial; and
2. That for a long time the appellant had established a passenger tariff rate between stations along the line of its road from the Ohio State line west, to the Illinois State line, including the stations in Wabash and Huntington counties; that the regular fare from Lagro to Antioch, on the line of the appellant's road, each way, was forty cents; that as a premium and inducement to pay at its station offices, the appellant discounted ten cents on every ticket purchased at such ticket-office; that it had an obvious policy in so doing, to put a check on those who handled passenger fare on the train; that on and at the times mentioned in the complaint

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the appellee entered the cars at Antioch, with the avowed purpose of riding therein to Lagro, and when called upon for his fare, tendered thirty cents, and positively refused to pay any more; that he entered the cars with the avowed purpose, expressed at the time and while on the cars and at sundry other times, of testing the question of the appellant's right to charge and take on the cars the regular fare of forty cents between the said points; and that the appellee refusing, in a boisterous and insolent manner to pay the said regular and established fare, and creating a disturbance of the other peaceful and well-behaved passengers, the appellant's conductor stopped the train and put the appellee out, as on account of his said conduct the conductor had a right to do. Wherefore, etc.

Before the filing of this answer the appellant offered in writing to confess a judgment in favor of the appellee for the sum of twenty-five dollars, in full of all damages by reason of the alleged wrong stated in his complaint.

The appellee replied by a general denial to the second paragraph of appellant's answer.

[Omitting an immaterial statement.]

The issues joined were tried by a jury, and a general verdict was returned for the appellee, assessing his damages in the sum of five hundred dollars. The appellant's motion for a new trial was overruled, and its exception was duly entered to this ruling, and the court rendered judgment for the appellee upon the general verdict of the jury.

The principal error, properly assigned by the appellant in this court, is the decision of the Circuit Court in overruling its motion for a new trial. In this motion there were many causes assigned for such new trial, consisting chiefly of alleged errors of law occurring at the trial, and excepted to, in the admission of improper evidence, and in the instructions given the jury of the court's own motion and at appellee's request, and in refusing to give instructions asked for by the appellant. The appellant's counsel complain in argument, in this court, for the most part, of the instructions given the jury, and of the refusal of the court to give the instructions requested by the appellant.

Before considering any question arising on the instructions given or refused, we may properly give a brief statement of the case made by the evidence. The appellee was a witness on the trial in his own

behalf, and we give the substance of his evidence, as follows: About the 21st day of August, 1873, he got on the appellant's cars at Lagro to go to Huntington, and paid his fare on the train to the conductor who charged him sixty-five cents for the trip, which was ten cents more than what he, the appellee, thought was the usual fare between those places. On the 27th day of August, 1873, he got on the appellant's cars at Wabash to go to Lagro, and paid his fare on the train to the conductor, who charged him thirty-five cents for the trip, or ten cents more than he had ever paid between those places; and although he had frequently rode on the appellant's road between those points, sometimes with and sometimes without tickets, he had always paid the same fare, to wit, twenty-five cents. On the evening of August 28th, 1873, he got on the appellant's cars at Antioch, to go from that place to Lagro; and "when the conductor came along and asked me for my fare, I asked him what it was to Lagro? He replied, forty cents. I told him I thought he was mistaken. He remarked that it was forty cents. I said to him, 'You have carried me twice before this; once last evening; don't you remember it?' He said he did. Then he said to me: 'Do you say you will not pay me forty cents?' I told him I would not pay but thirty cents. He then said, 'I will put you off the train, if you do not pay me forty cents.' The forty cents he repeated two other times. I said to him, 'If you think best, you had better do it.' Then he looked out the window to the brakemen and made motions to him to put on the brakes, and then began to pull the bell rope. The train did not seem to check up, and he called out the door and spoke to the brakeman to tighten the brake, and he again began to pull the bell rope; and we got out on the platform by the crowd pushing from behind, and then again he asked me: 'Do you say you will not pay me forty cents?' I replied to him, I would not pay but thirty cents. Then he told me to get off the train, that he did not want to be waiting there. I looked to see what kind of a place it would be to be thrown off. There were several iron rails lying there and a ditch close by, and I concluded to get off without being pushed off, and I then stepped off. I told him all the other conductors charged the rate I named. He said, 'they done wrong; no reason why he should.' I think I acted quietly and peaceably, and think I did nothing out of the way. I had said nothing to any one, and saw no one I knew. My purpose was to go to Lagro. * * * * I am now in my sixtieth

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year; after being put off the train, I went to Lagro; distance about three and one-half miles; I took the tow-path from the railroad crossing; I was about two or two and one-half miles below Antioch; don't know the distance exactly. * * * I think I had fifty cents in my hand, and offered to pay him thirty cents; he was very short; had but a few words; made no explanation; I supposed he wanted a little spending money."

This is the substance of the appellee's account of the matters, on which he has founded this action. The first two matters referred to in his evidence are the matters of extortion, counted upon in the first two paragraphs of his complaint. In his evidence he claims that ten cents was extorted on each of the two trips on occasions, making in the aggregate the sum of twenty cents. As the court below instructed the jury that the measure of damages would be, "upon the first two paragraphs of the complaint, the amounts extorted from the plaintiff by overcharging," we may reasonably conclude, we think, that all the damages allowed the appellee by the jury in their general verdict, with the exception of the twenty cents extorted, were assessed upon the cause of action stated in the third paragraph of his complaint. With respect to this third paragraph, we have given the appellee's version, under the sanction of his oath, of the matter counted on in said paragraph, in almost his exact language, as we find the same in the bill of exceptions containing the evidence.

Upon the case stated in the third paragraph of the complaint, and the evidence given on the trial, the court, of its own motion, gave the jury trying the cause the following instruction, to wit:

"3. In this State the law prohibits a railroad company from ejecting a passenger from the cars for a refusal to pay his fare, except at a usual stopping place; and if you find from the evidence that the defendant [plaintiff?] was put off the train at a place remote from a usual stopping place, for no other reason than that he refused to pay his fare, then the plaintiff is entitled to recover."

It is evident, we think, that this instruction was founded upon the court's construction of section 28 of the general law of this State providing for the incorporation of railroad companies, approved May 11, 1852. Section 28 reads as follows:

"§ 28. If any passenger shall refuse to pay his fare or toll, the conductor of the train, and the servants of the corporation may put him out of the cars at any usual stopping place." 1 R. S. 1876, p. 709.

It would seem, from the language used in the instruction above quoted, that the court must have construed the provisions of this section 28 of the statute as amounting to a positive prohibition against any railroad company's right to put any passenger out of its cars, for his refusal to pay his fare, at any other place than a usual stopping place for its cars on the line of its road. Such a construction of the section quoted is not required by the language used therein, and is not in harmony with the general law of this State on the subject of the section, and therefore we are not inclined to adopt it. The section is permissive, and not prohibitory, in its terms. It allows a railroad company to do a given thing, for a specified reason, at a certain place; but the law does not prohibit the railroad company, either in that section or elsewhere, from doing the same thing for the same or any other valid reason, or at any other place. In the case of *Jeffersonville Railroad Co. v. Rogers*, 28 Ind. 1, it was well said by FRAZER, J.: "The passenger who refuses to pay fare is from that moment an intruder, and wrongfully on the train. He has no lawful right to be carried *gratis* to the next station. This is too plain to admit of debate. It follows that he may be expelled at once." The case cited was again before this court, on a subsequent appeal, when the following language was used in the opinion of the court, by WORDEN, C. J.: "If the expulsion had been rightful in itself, it might, perhaps, have been legally effected at any time of day or night, and at any place, without reference to stations or the convenience and comfort of the party expelled." *Jeffersonville Railroad Co. v. Rogers*, 38 Ind. 116; s. c., 10 Am. Rep. 103. The right of the railroad company to expel a passenger from its cars for his refusal to pay fare, as a rule, at any time "and at any place without reference to stations," was not doubted or questioned by the learned judge who wrote the opinion last referred to, but in that case it was shown that the passenger, Rogers, before entering the appellant's car, had properly applied at its ticket office for a ticket, and without fault on his part, but through the willfulness, mistake or inadvertence of its agent, had been unable to secure such ticket; and it was very properly held, we think, on those facts, that Rogers was entitled to be carried, by his payment to the conductor of the price of the ticket, and could not be required to pay, in addition to such price, the excess which by the rules of the company was charged the passenger, who with-

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out an effort to purchase a ticket, paid his fare on the cars to the conductor of the train.

In the case last cited, and in the case of *Indianapolis, etc., Railway Co. v. Rinard*, 46 Ind. 293, the legal right of a railroad company to discriminate between the amounts of fare where a ticket is purchased, and where the fare is paid upon the train, and to demand, exact and receive a larger fare, in the latter case, than the price charged for a ticket, is fully recognized by this court. In the case at bar, therefore, the appellant had the legal right to exact from the appellee, for his fare between Antioch and Lagro, a larger sum of money when paid to the conductor on the train, than it would have charged him for a ticket between the same places; and when the appellee refused, as he did, to pay the fare demanded, the conductor of the train had the right, and it was his duty as a faithful servant, to put the appellee out of the cars and off his train, at any time and at any place on the line of the road, without reference to stations, and without actual danger to his life or person. When he refused to pay his fare, he became an intruder, a mere trespasser, in the appellant's cars; and he had the rights of a trespasser, and no other rights. Certainly he had no right to be carried by the appellant, without charge, to the next station.

It would seem from the record before us, that there were no intermediate stations on the appellant's road between Antioch and Lagro, only a distance of six miles intervening between said places. The appellee entered the appellant's cars at Antioch to go to Lagro, and when the conductor demanded his fare, the train was very nearly equi-distant between the two places. When he refused to pay his fare, it surely was not the appellant's duty to carry him to Lagro, the place of his destination, before putting him off the train. Yet if the court's construction of said section 28 of the statute, as contained in the instruction above quoted, were the correct one, the necessary consequence would be that all railroad companies in this State could be compelled to carry all their passengers *gratis* to the next "usual stopping-place."

It is claimed by the appellee in this case, and it was so testified by him as a witness on the trial, that he had never heard before that an extra charge was made for fare when paid on the train. It is difficult to reconcile and harmonize the appellee's evidence in this regard with the first two paragraphs of his complaint and his evidence in support of said paragraphs. For in those paragraphs, he

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claimed, and his evidence tended to sustain such claim, that within one week prior to his attempted trip from Antioch to Lagro, the appellant's conductor had, on two different occasions or trips, extorted from him on the train ten cents on each trip more than the usual or customary fare. It is difficult to believe that he had so recently suffered the loss of these two sums of ten cents each, by extortion as he claimed, without having inquired into and ascertained, as he might easily have done, the probable cause or pretext for such alleged extortion. But however this may have been, it is not claimed or pretended that he could not have readily ascertained, by proper inquiry, the rules and regulations of the appellant in regard to the purchase and price of tickets, and the payment of passenger fare on the train. If he did not know the appellant's rules on these subjects, he ought to have inquired of its agents, before he became a passenger on its cars. It is not claimed that he did not have abundance of time and ample opportunity to make all proper inquiries and purchase a ticket of the appellant's agent at Antioch before he entered the cars. Having failed to purchase a ticket, or to ascertain the rules of the appellant in regard to the payment of passenger fare on the train, he was in fault, and when the conductor demanded of him ten cents more than what he supposed was the regular fare, he should have paid the money and investigated the matter afterward. Upon his refusal to pay his fare, the conductor was fully authorized and justified, as we have already said, in putting him out of the cars and off the train, at any place not dangerous to his life or limbs.

For the reasons given, we are of the opinion that the court's instruction, above set out, to the jury trying the cause, was erroneous, and ought not to have been given, and on this ground a new trial ought to have been granted.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

[An immaterial direction omitted.]

Petition for a rehearing overruled.

NOTE BY THE REPORTER.—The same doctrine is held in *Baltimore, etc., R. Co. v. McDonald*, 68 Ind. 316, and it is also there held that it made no difference that the conductor had previously received a part of the fare. In *DuLaurans v. First Div. St. Paul & Pacific R. Co.*, 15 Minn. 49; s. c., 2 Am. Rep. 102, it was held that if the conductor received and retained part of the fare an ejection for non-payment of the balance was unlawful. The

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same was held by the California Supreme Court, September, 1880, 6 Pac. C. L. J. 276, a case similar in facts to the principal case. The court said:

"The conductor had no right to eject the plaintiff from the cars without returning the money which he had paid. Admitting that the regulation which forbade the conductor's accepting fare from a passenger after the train had been stopped on account of his refusal to pay fare was a reasonable rule, this only makes it apparent that the money should have been returned before the train was stopped. There could be no stronger evidence that the sum paid was received as full fare than the fact that the conductor retained it. The passenger was justified in relying upon that fact until the money was repaid. The conductor certainly had no authority under any reasonable rule to eject the passenger and *keep the money*. The stopping of the train and the actual amotion of plaintiff were parts of a single act by which the servants of defendant asserted a right to do that which they were not authorized to do while retaining plaintiff's money. If they could turn him out and then return the money he had paid, they could turn him out and not return the money at all. Indeed, it was argued by counsel for respondent that the servants of respondent possessed such power, and that the only redress to which plaintiff could resort was an action *for money had and received*. The whole matter was made to turn in the court below upon the hidden purpose of the conductor. Though the amount paid was paid by the plaintiff as and for his fare, and although the conductor received and pocketed the amount paid, still, if he did not *intend* to accept it as *full fare*, he had the right (as the jury were instructed) to confiscate the sum paid to the public use — or for his own benefit, or to that of his employers — and exclude the man who paid it from the cars. The question was not whether the plaintiff and defendant entered into a special agreement whereby plaintiff was to be transported for the sum paid, but whether plaintiff had a right so to consider it until his money was repaid, and whether until that event the agent of defendant was justified in ejecting plaintiff. The jury were told that unless the conductor who received the money received it with the specific intent that it should constitute full payment for the service then being performed by defendant, 'he had a right to put plaintiff out without returning the money — without offering him the said two dollars, or any part thereof.'

"If the conductor had demanded and received the two dollars as and for the full fare, or had agreed to transport the plaintiff for that sum, it is clear that the latter could not have been ejected for non-payment of his fare. Yet the jury were told that 'if the minds of the parties met upon one common proposition,' to the effect that the two dollars were paid and received by the conductor as the full fare, the latter could not eject the plaintiff without first returning the money, thus intimating that he could turn him out if he first returned that which had been received as full fare. This charge certainly tended to confuse the jurymen."

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

OREM V. WRIGHTSON.

(51 Md. 34.)

Surety — subrogation — to prior claim of State on assets of decedent.

The surety of a deceased debtor to the State, having paid the debt to the State, is entitled to be subrogated to the State's prior claim in the distribution of the debtor's assets.

A PPEAL from order of Orphans' Court for Talbot county.
The opinion states the case.

Joseph B. Seth, for appellant.

Philip F. Thomas, for appellees.

BRENT, J. The appellees were sureties upon the bond of Arthur W. Leeke, collector of State taxes for Talbot county. Leeke proceeded to collect a large amount of said taxes, but died before paying into the treasury of the State the whole amount so collected by him. For this balance, due at the time of his death, suit was afterward brought, upon the bond, by the State against the appellees,

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and judgment obtained. Having paid their respective portions of the judgment, they now seek to recover the sums of money so paid from the personal estate of Leeke, the principal debtor, in the hands of his administrator. This being insufficient to pay all the debts due, the ground is taken that this is a preferred debt, and as such must take priority in the distribution. The record shows that there is no other claim of preference against the property.

The Orphans' Court of Talbot county in June, 1878, upon the final distribution of this estate passed an order allowing a priority to this claim of the appellees, and from that order the present appeal is taken by one of the other creditors.

Appended to the agreed statement of facts in the record is the following:

"It is further agreed, that in the foregoing proceedings, the questions submitted to the Orphans' Court, and upon which their order of the 11th of June, 1878, was passed, were :

"First. Whether, under the facts of this case, the State of Maryland was entitled to priority of payment of its claim, out of the assets of the estate of Arthur W. Leeke, deceased ; and if so, whether, secondly, the sureties in Leeke's bond, as collector of State taxes, having paid the said claim, were entitled to be subrogated to the State's priority? Both of these questions were decided affirmatively by the Orphans' Court, and upon this appeal, the same questions will be submitted to the Court of Appeals."

The priority of the State in the payment of its claim against a debtor is not a new question. It was recognized and enforced as early as 1787 in the case of *State v. Rogers*, 2 H. & McH. 198 ; and again in 1793 in the case of *Murray v. Ridley's Administratrix*, 3 id. 171, where one of the questions presented in the distribution among creditors, of the estate of the intestate Ridley, was the priority of the State as a preferred creditor. The same question also arose in *Contee v. Chew's Executor*, 1 H. & J. 417, and the right of the State to be first paid out of the assets of its deceased debtor was again announced. In these cases there was no opinion delivered, giving the grounds of the decision. But in the case of *State of Maryland v. Bank of Maryland*, 6 G. & J. 205, argued by the ablest members of the bar, the question was again presented, and is treated at considerable length in the opinion of court, delivered by Chief Judge BUCHANAN. The conclusion reached by the court is in favor of the State's right of *priority*, as a prerogative

right derived from the common law, entitling her to be first paid, except where some antecedent lien stands in the way. This may now be well considered as the settled law in this State.

In the present case, there being no liens in the way, the State was clearly entitled to be first paid out of the assets in the hands of the administrator of Leeke.

The next question to be examined is, to what rights, if any, the appellees as sureties of Leeke are subrogated by their payment to the State of the debt due by him, at the time of his death, as principal debtor.

The doctrine of subrogation, or substitution as it is also termed, is a peculiar feature of equity. It is not founded in contract, but has its origin in a sense of natural justice. So soon as a surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor, and gives him every right, lien, and security, to which the creditor could have resorted for the payment of his debt. As said in the annotation to the case of *Dering v. Earl of Winchelsea*, 1 Lead. Cas. in Eq. 60 (m.) "Payment by one who stands in the relation of a surety, although it may extinguish the remedy or discharge the security, as respects the creditor, has not that effect as between the principal debtor and the surety. As between them it is in the nature of a purchase by the surety from the creditor; it operates an assignment in equity of the debt and all legal proceedings upon it, and gives a right in equity to call for an assignment of all securities; and in favor of the surety, the debt and all its obligations and incidents are considered as still subsisting." A large number of American cases are cited, and they sustain fully these general principles.

The doctrine announced in *Copis v. Middleton*, 1 Tur. & Russ. 224, to the effect that equity will not subrogate the surety in cases where payment extinguishes the security at law, has not been generally followed in this country. While it has been adopted in cases in Alabama and North Carolina, it seems that the courts in the other States, where the question has arisen, and the Supreme Court of the United States, 12 Wheat. 598, have held the opposite view. The annotators in 1 Lead. Cas. in Eq. 88, referring to the cases in the United States, say, that with the exception of the cases in the two States above named, "it appears to be universally and firmly settled, that although the surety or lien be extinguished at law, yet for the benefit of the surety, by whose money or property

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the creditor has been satisfied, it continues in full force." This rule is equitable and just, and supported as it is by the great weight of authority in this country, we feel justified in adopting it. See *Hollingsworth v. Floyd*, 4 H. & G. 90; *Sotheren v. Reed*, 4 H. & J. 309; *Creager v. Brengle*, 5 id. 240; *Merryman v. State*, id. 427.

The question of the subrogation of the surety to the priority of the creditor, by the payment of the debt to him, has arisen, as in the present case, most frequently in regard to the distribution among creditors of assets in the hands of an executor or administrator. In *Powell's Ex'rs v. White*, 11 Leigh, 309, after a very able and extended review of the authorities, especially the English, a surety upon a bond, who had paid it off after the death of the principal debtor, was held to be subrogated to the same right of priority in the distribution of assets in the hands of the executor, which the law of the State conferred upon bond creditors.

In *Lidderdale v. Robinson*, 2 Brock. 159, the doctrine of subrogation arose, and the extent to which a surety, who has paid the debt, is subrogated to the priority of the creditor, was presented and considered. Chief Justice MARSHALL, in his opinion in the case, adopts the Virginia decisions as establishing "the principle incontrovertibly, that the surety who has paid a debt stands, as respects his claim on the principal or his estate, to every purpose in the place of the creditor." He refers to the three cases in 4 Johns. Ch. 123, 530, and 545, as recognizing the same principle, and to the case in 4 Desaus. 44. He then proceeds to say: "The principle that a person, who has paid money as surety or on account of another, shall be substituted in the place of the creditor, seems to be familiar in England. In 3 P. Wins. 400, it is laid down by the chancellor, that an executor, who has paid beyond the assets which have come to his hands shall rank as the creditor whose debt he has paid." 1 Atk. 134; *Ex parte Crisp*, 2 Ves., Sr., 302, and 11 Ves., Jr., 22, are also cited in the opinion. In the case the learned chief justice not only maintains the right of a surety to be subrogated to the priority of the creditor against the principal debtor, but extends the doctrine against a co-surety.

This case was carried to the Supreme Court of the United States upon a certified division of opinion between the chief justice and Judge TUCKER, who sat with him in the Circuit Court, and is reported in *Lidderdale v. Robinson*, 12 Wheat. 594. The Supreme Court sustained the views of the chief justice, and in the conclusion

of their opinion on page 598, they say : " That this, then, is the settled law of the State, in which this contract and cause originated, cannot be doubted. But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness on general principle, and on authorities of great respectability in other States." See, also, *Watts v. Kinney*, 3 Leigh, 272 ; *Cheeseborough v. Millard*, 1 Johns. Ch. 413 ; 7 Am. Dec. 494 ; *Croft v. Moore*, 9 Watts, 409 ; *Himes v. Keller*, 3 W. & S. 404 ; *Carrico v. Farmers and Merchants' Nat. Bank, etc.*, 33 Md. 241, and cases there cited.

We might cite a very large number of other authorities upon this point, but have not considered it necessary. We think the doctrine is well established by a decided preponderance of the cases, that a surety, who has paid the debt of his principal obligor, is subrogated in equity by the act of payment, not only to the securities of the creditor, but to all his rights of priority. If therefore the creditor could have rightfully claimed a preference in the distribution of assets, the same preference will be held by way of subrogation for the benefit of the surety.

Is a different rule to be applied where the State is the creditor ? We can see no reason why it should be. It is not necessary to inquire how or in what manner the State's right to rank as a preferred creditor is derived, whether it is a prerogative right derived from the common law, or whether it has been conferred by statute. As is said in some of the cases to which we have referred, equity in applying the doctrine of subrogation looks not to form, but to the substance and essence of the transaction. It looks to the debt which is to be paid, and not to the hand which may happen to hold it, and will see that the fund charged with its payment shall be so applied. 3 Leigh, 295.

In the present case, the debt of the collector, Leeke, was due to the State at the time of his death. It was a charge against him as the principal debtor, and upon the assets left by him. The latter constituted the fund out of which it was to be paid as a preferred debt. And if equity does not regard the hand which holds the debt, and will see that the fund charged with its payment shall be so applied, what difference can logically result whether the creditor, to whom the surety has made payment, is the State or an individual.

While this view of the law will do no wrong to any one, it will

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aid facilities in securing and collecting the revenue of the State. If sureties know that they can be subrogated to the priority of the State, less apprehension will be felt in joining in the bonds of collectors, and less delay in payment by solvent sureties; other creditors are not injured, for if the State has the first claim upon the fund, it does them no wrong whether this claim is enforced by the State, or by those standing in its stead.

We have not referred to the agreement in regard to the assignment, under the act of assembly, of judgments obtained by the State. Our decision rests entirely upon the doctrine of subrogation, and outside of any consideration of the effect and requisites of an actual assignment.

Upon the whole, we think the sureties in this case are equitably entitled to be subrogated to the priority of the State, and that by virtue of such subrogation the debt, which they have paid to the State, should be first paid to them in the distribution of the assets in the hands of Leeke's administrator.

The order of the Orphans' Court, appealed from, will therefore be affirmed.

Order of Orphans' Court affirmed, and the costs to be paid out of the fund.

Order affirmed.

BALTIMORE AND OHIO RAILROAD COMPANY V. STRICKER.

(51 Md. 47.)

Master and servant — negligence — low bridge.

A conductor of a railway train, while standing on the top of a car in motion, in the discharge of his duty, was injured by being brought in contact with a low bridge. He had been well acquainted with its position and character, and accustomed to pass under it. *Held*, that the company were not liable in damages.

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

John K. Cowen and A. H. Syester, for appellant.

Albert Ritchie and John Ritchie, for appellee.

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BARTOL, C. J. This suit was brought by the appellee to recover for injuries received by being carried against a bridge, spanning the appellant's road, while he was on top of a "house car," in the discharge of his duty as conductor of a freight train.

The accident happened on the 6th day of June, 1876, in passing under the bridge, called "Bull Eye Bridge," which was built by the appellant, on a public road about three-fourths of a mile east of Martinsburg.

It appears from the evidence, that the appellee entered the service of the company in 1867, as a brakeman on freight trains between Martinsburg and Baltimore. In July, 1869, he was promoted to be a conductor of freight trains on the same section of the road, and continued in that employment till the time of the accident. In that capacity it was his duty to assist at the brakes.

When the appellee first went upon the road the house cars of the company were from nine to ten feet high; about the year 1869, connection with western roads began to be formed, and higher cars were introduced from the west, the company also began to construct new cars, which were ten feet ten inches, to eleven feet high, and the western cars, sometimes used, were eleven and a half feet high. The plaintiff testified that some of the new cars were on the road while he was brakeman; the number of these was increased, and they were in general use after 1872 or 1873. They were constructed with the brakes on top, and to manage the brakes, it was necessary to be on the top of the car.

In 1872, the old "Bull Eye" bridge was removed, and a new bridge built, which was of different construction, and of about the same height as the old one, that is to say, seventeen feet four inches high, measuring from the railway to the struts or lowermost timbers of the bridge.

On the 6th of June, 1876, the appellee, having in charge a freight train, consisting of twenty-three loaded cars, viz., eighteen gondolas, four hoppers and one of the new house cars, and also the caboose, was ready to start from Martinsburg at six o'clock in the morning. In order to leave the track clear for an expected passenger train, as was his duty, he took his train upon a siding, or switch, between Martinsburg and the bridge where he remained till half-past six, when he brought his train on the main track and proceeded on his way. The distance from the bridge to the switch was 200 to 300 yards, from which place the bridge was in full view.

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The accident happened in this way: the appellee was assisted by one brakeman, who remained behind to lock the switch; the appellee being specially charged to see that this important duty was performed, held the train waiting till it was done. He was standing on the sixth or seventh car from the rear of the train, looking back to see the brakeman lock the switch, and for his signal, when he saw this, he immediately signalled the engineer to go on, and began to let off the brakes, had let of the brakes as far back as the house car, which was the last car except the caboose, had got on top of it about the center, and was walking toward the brake, for the purpose of letting it off, and then going into the caboose, when he was struck by the strut of the bridge, his back being then turned toward it.

The appellee testified that he had never heard of any one having been struck by this bridge, before he was struck, that no one on the part of the company had ever told or notified him that this bridge was too low, that he did not know its exact height, but supposed that the struts were high enough to clear a man standing on top of such a car as he had. Had never before had occasion to be adjusting the brakes, or to be walking on top of a car as he was passing under that bridge. Had been on the siding often before, but had never started from it on his trip, had always started from the station, and that gave him ample time to have the brakes adjusted before he got to the bridge.

Proof was given that it was known to Mr. Wilson, the company's master of road, that the "Bull Eye" bridge was not high enough to allow a man to pass under it standing on top of the new house cars; and further that there were no signal ropes to warn persons approaching the bridge, such as were used at some of the other bridges.

On the other hand, a number of witnesses, examined by the defendant, conductors, brakemen, and engineers, employed on the same section of the road, testified that this bridge was too low to allow a tall man to pass under it, standing upon a house car, that this fact was plainly visible and obvious to any one passing under it, and that it was the habit of brakemen and conductors, when on top of a house car, to stoop or remain seated while passing under the bridge. Two of them, Bierman, the engineer, and Dixon, the brakeman, were on the same train with the appellee when he was struck, both testify that they had often seen him stoop down when passing

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under the same bridge. And the appellee himself stated in his testimony, that he was down on the gondola car, and never thought of the bridge; if he had known how near he was to it, he would not have gone on top of the house car, and if he had seen the bridge would have sat down. He further states that he never made any complaint to any officer of the company of the lowness of the bridge; knew that the bridge which was there before 1872 was too low to allow him to pass under it standing on top of the new house cars, and always stooped in going under it; had heard that the new bridge was higher, but did not know how much higher, did not know till that morning that he could not pass under it with safety standing on a house car, might have supposed it was too low, but could not tell it till he was struck.

It appeared in proof also that the appellee lived in Martinsburg, was well acquainted with "Bull Eye" bridge, its position and surroundings, and while in the employ of the company made about thirty trips a month, fifteen each way, and had passed under the bridge over 3,000 times, or nearly 1,500 times after the new or higher cars were generally used.

Other testimony is offered which it is not necessary to repeat. Three witnesses, McGee, Miller and Leonard, employees of the company, testified that they had been struck by the same bridge, but each explained the circumstances causing their accidents, which show that these resulted from their own carelessness and inattention, and each testified that they were caused by their own neglect and want of caution.

Now the question presented for our consideration is, what are the rules of law applicable to the state of facts disclosed by the bills of exceptions, and which have been before stated?

To entitle the appellee to maintain the suit it was necessary to prove that the company had been guilty of negligence which directly caused the injury, that is to say, that in the relation which existed between the appellee and the company the latter had failed or neglected to perform some duty toward the appellee which was devolved upon it by the law; and secondly, it must appear that the appellee was not guilty of any negligence on his part, or any want of reasonable prudence and caution to avoid the accident.

1st. As to the alleged negligence on the part of the company. In what did this consist? It was said it was negligent in constructing the bridge so low that a conductor or brakeman could

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not pass under it in safety on the top of a house car, where his duty required him sometimes to be.

But there is no evidence to support this position; on the contrary, all the proof shows that the employees of the company, and the appellee among them, every day passed under the bridge safely by observing the simple and easy precaution of stooping or sitting down while passing under the bridge.

No negligence can be imputed to the company because the struts of the bridge were not high enough to allow a person to pass under them standing upright on the top of the cars. *Baylor v. Del. & W. R. R. Co.*, 11 Vroom, 23; s. c., 29 Am. Rep. 208.

It was not required of the appellee to stand on his feet while passing the bridge; he was in that position, according to his own statement, because his back was turned toward the bridge, "he did not think of it, and did not know he was near it;" but he knew it was there, it was in full view only a few moments before, when he started his train from a point only 200 or 300 yards distant.

Nothing is better settled than that "the implied contract between the employer and employee is that the latter takes upon himself all the natural risks and perils incident to the service." *Moran's case*, 44 Md. 292, as expressed by COCKBURN, C. J., in *Clarke v. Holmes*, 7 H. & N. 943. "When a servant enters upon an employment he accepts the service subject to the risks incidental to it." The rule is well stated in Whart. on Neg., § 214: "An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had opportunity to ascertain."

Some stress has been laid by the appellee's counsel on the fact that when the appellee entered the service of the company, in 1867, and for some years afterward, the cars in use were of such size and structure that no danger whatever was incurred by standing on the top of them in passing under the bridge, and that afterward higher cars were introduced, upon which a person could not with safety stand erect while passing under the bridge, and this change is relied on as an unwarrantable increase of risk and danger to the appellee after he had entered the service of the company.

Many cases have occurred, in which it has been held to be the duty of the employer to give notice or warning to the employee of increased risk or danger to which he may be exposed, where a

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change has been made in the nature of his duties, and a failure to give such notice or warning has been held to render the employer liable for the consequences ; but this principle has no application to the present case. It is applicable where the increased risk or danger to the employee arises from causes hidden and secret, and such as would reasonably escape his observation.

In this case the introduction and use of the new house cars commenced as early as 1872, was well known to the appellee, and with that knowledge he continued in the service of the company for the space of four years.

So that in this respect, the case stands on the same ground as if the condition of things which existed at the time of the accident was the same as when the appellee first entered the service.

The bridge was, during all this time, a permanent structure visible to the appellee, and the new cars were in daily use by him during that period.

"If a man chooses to accept the employment, or continue in it, with the knowledge of the danger, he must abide the consequences, so far as any claim against the employer is concerned." *Wooley v. M. D. Railway Co.*, L. R., 2 Ex. Div. 389.

What then was the legal duty of the company? This is well stated in the appellee's brief: "It was the duty of the company to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway structures and instrumentalities; and it must not expose its employees to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service; and the employee has a right to presume that the company has discharged these duties." This rule is supported by *O'Connell's case*, 20 Md. 212; *Scally's case*, 27 id. 589; *Wonder's case*, 32 id. 419.

Let us apply it to the present case. As we have before said, the contract of service by the appellee was made while the bridge of 1872 was standing, and the new cars were in use, or which is the same thing, he voluntarily continued in the service after that time, with a full opportunity of knowing the risk to which he was exposed. In constructing the bridge all that was incumbent on the company was to build it of sufficient height, to enable the employees, in the discharge of their duties, to pass under it in safety, by the use of ordinary care and prudence; and there is no evidence in the case that this duty was not performed. In our opinion the

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ninth prayer of the appellant states correctly the duty and obligation resting upon the company in the construction of the bridge, and as there was no evidence of any negligence on the part of the company in this respect, the ninth prayer ought to have been granted, which denied to the appellee the right to recover; there being a failure of evidence to support a material part of his case.

We think the evidence tended strongly to prove that the accident was caused by a want of reasonable care on the part of the appellee; but we do not rest our decision on this ground. In the midst of his pre-occupation with his duties, he might be excusable for losing sight of the danger menacing him at the moment. But this peril was one incident to the employment, in contemplation at the time of the contract, and arising from causes open and obvious, the dangerous character of which he had an opportunity to ascertain, and the risk of which he assumed.

Having stated our opinion upon the rules of law applicable to the case, which deny to the appellee the right to recover, it is not necessary to notice particularly the several prayers contained in the record.

The first prayer of the appellee submitted to the jury, in general terms, the question of reasonable care on the part of appellant, in constructing the bridge, with a view to the safety of its employees, and also whether the appellee had used ordinary and reasonable care, under the circumstances, to avoid the accident.

Such an instruction would in some cases be correct, but as was said by ELLSWORTH, J., in *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 557, when speaking of a general instruction of this kind, "it ignores the clear distinction between an employee having knowledge of the business and one having no knowledge."

"The employee here was acquainted with the hazards of the business in which he was engaged. * * * He must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself the hazard, when he entered, or when with that knowledge he chose to continue in the service of the company." There being in this case no evidence of negligence on the part of the company, it was error to submit that question to the jury.

Judgment reversed.

HOSHALL v. HOSHALL.

(51 Md. 72.)

Marriage — limited divorce — cruelty — single act of.

A single act of personal violence by husband to wife does not constitute "cruelty of treatment" within the statute of divorce.

ACTION of divorce. The opinion states the case. The defendant had judgment below.

D. G. McIntosh and Arthur W. Machen, for appellant.

William S. Keech, for appellee.

BARTOL, C. J. A careful examination of the evidence in this case has brought us to the same conclusion reached by the judge of the Circuit Court, and so well expressed in his opinion contained in the record.

The only ground upon which the claim of the appellant to a divorce seems to rest with any degree of plausibility is the alleged "cruelty of treatment" by her husband; but in our judgment the testimony fails to make out a case of cruelty of treatment, such as is contemplated by the act of assembly (1872, ch. 272), as this has been uniformly understood and defined by the courts.

A single act of personal violence by her husband is proved, and it appears that this was provoked by her own unjustifiable conduct. It occurred in October, 1876, and soon after she voluntarily left her home, and went to live with one of her married daughters. This single act of violence on his part, though it cannot be justified in morals or in law, did not constitute "cruelty of treatment" within the meaning of the law, as a cause for divorce *a mensa et thoro*.

There is no proof in the record of any systematic or continued cruelty of treatment by the appellee, or any danger to her life, limb or health, such as renders impossible the proper discharge of the duties of married life.

If, said the court in *Dysart v. Dysart*, 1 Rob. 140, "a wife can insure her own safety by lawful obedience, and by a proper self-command, she has no right to come here; for this court affords its

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agreement for any other purpose than that for which it was purchased with the money of Turnbull & Co., and delivered at his factory, than he would to have used any other cotton belonging to Turnbull & Co., and which they had deposited with him as a bailee, to manufacture into cotton cloth for them. In fact, it is in proof that the cotton was purchased by Turnbull & Co., and invoiced to them, and paid for by them, and delivered at the "Mount Vernon Factory," for the purpose of being manufactured for them. Indeed, if the purchases of the cotton had been made by Thomas in person, he should be taken to have made them, under this agreement, as agent for Turnbull & Co.

But this is an assignment or a covenant to deliver to the assignee, for valuable consideration received, after-acquired personal property. Is such an assignment valid, and can it be enforced against the lien of a subsequent execution?

At law it would not be a valid assignment. An assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed is void at law. *Holroyd v. Marshall*, 10 H. of L. Cas. 191, 215; *Robinson v. Macdonnell*, 5 M. & S. 228. In *Brockenbrough's Ex'x v. Brockenbrough*, recently decided by this court, 31 Gratt. 580, several decisions are cited by Judge BURKS in support of the doctrine as now stated, and qualifications of the rule explained, to which I beg to refer.

In the same case, upon the general doctrine in equity as to liens or charges upon after-acquired property, he quotes as follows from Mr. Justice STORY. In *Mitchell v. Winslow*, 2 Story, 630, after an examination of the authorities, Mr. Justice STORY says: "It seems to me a clear result of all the authorities, that whenever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then *in esse* or not, it attaches in equity, as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." Judge BURKS also cites numerous other cases which tend to establish the doctrine of an equitable lien or charge upon after-acquired property, but does not decide the question, not deeming it essential to the decision of that case.

In the leading case of *Holroyd v. Marshall*, decided by the House

Second National Bank of Baltimore v. Western National Bank of Baltimore.

SECOND NATIONAL BANK OF BALTIMORE V. WESTERN NATIONAL
BANK OF BALTIMORE.

(51 Md. 128.)

Bank — correction of erroneous certification of note — evidence — usage.

A bank having erroneously certified a note to be "good," can correct the mistake before liabilities have been incurred or losses sustained in consequence of such certification, and evidence of usage to the contrary is incompetent.

ACTION to recover amount of a note. The opinion states the facts. The defendant had judgment below.

William A. Stewart, for appellant.

William F. Frick, for appellee.

BRENT, J. There is really but a single question presented in this case, and that is, whether a bank, which by mistake has certified a promissory note, made payable at its banking-house, to be "good," can afterward correct such mistake.

It appears that the Second National Bank held by the indorsement of the payees a promissory note of Tilghman & Drakely, drawn at four months to the order of Carmine & Co., and payable at the Western National Bank, at which bank the drawers kept their deposit account. On the morning of the day on which the note was due, about half-past eleven o'clock, the runner of the bank, holding the note, presented it at the banking-house of the Western Bank, when it was certified by the paying teller as *good*, by writing upon it in blue pencil mark the initial letter of his name. The runner, after leaving the Western Bank, proceeded on his rounds, and reached the Second National Bank about one o'clock, when he told the president, Mr. Gilman, that the note had been paid, "meaning thereby that it had been certified."

About one o'clock the same day, the teller of the Western Bank, in putting another memorandum on his file, noticed the order of Tilghman & Drakely received that day, and which he had placed upon his file, directing him not to certify their "note to F. H. Carmine & Co., for \$1,200.00, due to-day." He immediately inclosed

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the order to the Second National Bank, with a note calling the attention of the bank to it, and requesting that his name might be erased. The messenger left a few minutes after one, and upon his return reported that the president said "all right."

About the same time a message was sent from the Second National Bank to Messrs. Carmine & Co., the indorsers, requesting them to call at its banking-house, and accordingly one of the firm came. The president, Mr. Gilman, stated to him the facts of the certification of the note, and the demand for its erasure. Mr. Carmine expressed his surprise that the note was not paid, and after some conversation with the president consented to waive protest, and at his suggestion wrote on the note, above the indorsement of the firm, "protest waived." All this appears to have transpired not later than two o'clock.

Afterward, at about three, it became known to the banks and the indorsers that Messrs. Tilghman & Drakely had failed.

Mr. Carmine after leaving the bank went to see Messrs. Tilghman & Drakely, and asked them for security, but they refused.

On the next day the Second National Bank, without erasing the certification, sent the note through the clearing house, debited to the Western Bank, and received the money for it.

The teller of the Western Bank, upon receiving its clearing house list of that day, found the note inclosed and debited to the bank. He immediately erased his certification, which was in pencil mark, and went with the note to the Second National Bank, where he demanded and received the money for it, and where he left the note.

These are the important facts in this case, and upon them the appellant must rest its right to recover from the appellee the amount of the note.

The presentation and certification of this note were in the regular course. The balances between the banks were to be settled daily through the clearing house, of which association they were members. To accomplish this, the bank holding a note presents it for payment, on the day of its maturity, at the bank where payable. If the drawer has the funds in bank to meet it, it is so certified by the teller, generally by memorandum on the note, and charged to the account of the drawer. It is then returned to the creditor bank, and retained till the following day, when it is used in the clearing house in the settlement of exchanges as an item of credit in favor of the one, and as a charge against the other. As said in

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the case of the *Irving Bank v. Wetherald*, 36 N. Y. 337, "The correctness of this certificate is a matter which the certifying bank has the means of knowing, and is bound to state correctly. If the presenting bank relies upon its accuracy, and fails to charge the indorsers as upon non-payment on presentation, the certifying bank is estopped from denying the truth of its statement. Having asserted, of its own knowledge, that the maker had funds in its bank to meet the note, and the presenting bank having omitted to charge its indorsers in reliance upon such statement, the certifying bank will not be permitted to go behind its own statements. The teller of the bank is the proper officer to make this statement, and his statement binds the bank, whether accurate or erroneous." The same principles are established in 16 N. Y. 125, and 25 id. 143.

If in the present case the Second National Bank had been misled by the certificate, and relying upon its accuracy had omitted to take steps to charge the indorsers, there can be no doubt the Western Bank would be bound to make good the amount of the note. But the facts are, that the Second National Bank was informed of the error as soon as it was discovered, and in time to fix the responsibility of the indorsers, either by protest, or by getting from them, as it did, a waiver of protest. There is no principle of law better established than that an error of fact may be corrected in any reasonable time before it is acted upon by the other party relying upon its truth and accuracy.

There can be no such stringent rule of law as would make a memorandum of this description irrevocable the moment it is placed upon the note. If put there in error, like any other error or mistake it may be corrected before rights and liabilities have been incurred or losses sustained in consequence of it. Here the corrected information was received by the bank nearly about the time their runner returned with the note. It gave them ample time and opportunity to act upon it and take the necessary steps to fix the liability of the indorsers. This, the proof shows, was done, and no damage or loss has been incurred from the mistake of the teller of the Western Bank. But even if steps had not been taken to fix the liability of the indorsers, the Western Bank could not have been held liable, as the corrected information was given in time to do so, and the presenting bank was bound to accept and to act upon it. 36 N. Y. 337.

There is nothing in the fact that this error was not corrected at

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the clearing house the following day. That was not the proper place to make the correction. One of the fundamental rules of the clearing house association is, that errors in the exchanges and claims, arising from the return of checks and other causes, are to be adjusted directly between the banks which are parties therein, and not through the clearing house. And this was promptly done, in the present case, by the Western Bank so soon as it received its clearing house list of the day.

An offer was made by the appellant, and rejected by the court, to give in evidence the existence of a usage, that a certification made in error could not be revoked before new rights had been acquired on the faith of such certification. That such usage had not been generally acted upon and understood by the banks is manifest from the proof on the part of the appellant which preceded the offer. But we have no doubt that the proof was offered in good faith. We think, however, it was properly excluded ; usage to be binding and effective must be uniform, notorious and reasonable. The idea that any such usage as offered was notorious and uniform was precluded by the proof already given. It was unknown to the president of one of the banks immediately concerned in this case, and to the cashier of the other. But the offer was rejected upon the more tenable ground, that even if any such usage existed it is unreasonable and repugnant to the well-settled rule of law. Errors, as we have already said, may always be corrected before the other party acting upon them as true has incurred any loss or damage, or assumed any new rights or liabilities. The rule rests upon the soundest principles of reason and justice, and any usage in conflict with it would be so unreasonable and unjust that it cannot be maintained.

It follows, from what we have said, that the rulings of the Court of Common Pleas, upon the admissibility of evidence, and upon the several prayers offered, are without error. The judgment will therefore be affirmed.

Judgment affirmed.

Third National Bank of Baltimore v. Lange.

THIRD NATIONAL BANK OF BALTIMORE V. LANGE.

(51 Md. 138.)

Negotiable instrument — payable to "trustee" — subsequent indorsement.

A note payable to the order of one as "trustee" is not negotiable; and a subsequent indorser before indorsement by the payee is not liable.

PROCEEDING to enjoin the collection of a note. The opinion states the case. The plaintiff had judgment below.

Henry Stockbridge, for appellant.

Thomas R. Clendinen and *Albert Ritchie*, for appellee.

BRENT, J. The note, about which this case has arisen, is as follows :

" \$1,100.

BALTIMORE, Feb. 8, 1876.

Twelve months after date we promise to pay to the order N. W. Watkins, trustee, eleven hundred dollars with interest, value received.

FLYNN & EMERICH."

The names of "N. W. Watkins, trustee," and "J. Regester & Sons," are indorsed upon it.

This note was given for the purchase of property sold by N. W. Watkins, as trustee, under a decree of the Circuit Court of Baltimore city, and is for one of the deferred payments, as authorized by that decree. At the time of its delivery to the trustee, it was indorsed by J. Regester & Sons as securities for the drawers,—the terms of sale requiring the deferred payments to be secured in that form.

Subsequently N. W. Watkins wrote above the names of J. Regester & Sons the indorsement "N. W. Watkins, trustee," and applied to the Union Banking Company to buy the note, offering to sell it for twelve per cent off. The banking company not being willing to buy it, its cashier offered to sell it for Watkins, and placed it in the hands of a bill broker for that purpose. After getting into the hands of a second bill broker it was taken by him to The Third National Bank, the appellant, and offered to it for sale. The bank

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bought it from the broker at nine per cent off, and the proceeds seem to have been appropriated by Watkins.

The appellees claim that the bank acquired no right to the note, while it is contended for the bank that the note is embraced in the class of commercial paper, and was acquired by it in a usual and proper way.

Without intending to decide upon the right of a National bank to purchase paper, as the question does not necessarily arise in this case, we do not think the note in question is within the class of paper known as commercial paper. Although like it in general form, the fact that it is payable to the order of Watkins, trustee, restricts its free circulation, and excepts it from some of the rules governing commercial paper.

No doctrine is better settled than that a trustee has no power to sell and dispose of trust property for his own use and at his own mere will. One who obtains it from him or through him with actual or constructive notice of the trust can acquire no title, and it may be recovered by suitable proceedings for the benefit of the *cestui que trust*. If there are circumstances connected with the purchase which reasonably indicate that trust property is being dealt with, they will fix upon the purchaser notice of the trust, and if he fails to make inquiry about the title he is getting, it is his own fault and he must suffer the consequences of his own neglect.

The general doctrine is stated in 1 Story's Eq. Jur., § 400, where it is said: "For whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances and persons) is, in equity, held to be good notice to bind him." A large number of authorities is referred to in the note, and it is unnecessary to allude to them more particularly.

In the case of the present note, it cannot be read understandingly without seeing upon its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and as it turns out he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed.

In the case of *Shaw v. Spencer*, 100 Mass. 382; s. c., 1 Am. Rep. 115, the question is considered, whether the addition of the word "trustee" to the name alone is sufficient to indicate a trust and put a party upon inquiry. That was the case of stock certificates, which

were pledged by the holder as collaterals for certain acceptances. The certificates in question were in the name of E. Carter, trustee. They were by him indorsed, and one of the questions presented was whether the word "trustee" was sufficient to put the holders upon inquiry, and thereby affect them with notice of the trust. The court says, on page 393: "The rules of law are presumed to be known by all men ; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question, whether the word 'trustee' alone has any significance and does amount to notice of the existence of a trust. But this has heretofore been decided, and is no longer an open question in this Commonwealth." And upon the ground that pledgees took the certificates with this notice of the trust, it was held that they could not retain them against the equitable owner, inasmuch as Carter, the trustee, had no authority to use or dispose of them for any such purpose.

The argument, that the bank should not be deprived of its action against J. Regester & Sons, whose indorsement it is claimed guarantees the preceding indorser, would be entitled to weight but for the facts of the case. While the rule is undoubted that a subsequent indorser guarantees the preceding indorsement, it cannot apply to a case where in fact there was no previous indorsement at the time of the alleged second indorsement. The obligations of J. Regester & Sons upon this note were those of original makers (*Ives v. Bosley*, 35 Md. 263; *Good v. Martin*, 95 U. S., 90), as is clearly shown by the proof in the case. Their name was placed upon the note as security, and they cannot be held to a contract of guaranty into which they never entered. That parol evidence is admissible to show the character in which they stand relative to this note is settled by the Supreme Court of the United States in the case of *Good v. Martin*, just referred to.

We are therefore very clearly of opinion that the bank cannot hold Regester & Sons liable as guarantors. When the note is paid, their liability ceases.

We find no error in the decree of the court below, and it will be affirmed. *Decree affirmed with costs, and case remanded.*

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ROSE V. MAYOR AND CITY COUNCIL OF BALTIMORE.

(51 Md. 256.)

Municipal corporation — market stall — nature of property in public.

Under a general power to lease, sell or dispose of market stalls for any term it might think proper, a municipal corporation sold a stall in one of the public markets, without limitation of term, and without any special ordinance authorizing the sale and prescribing the term. *Held*, that such sale conferred no absolute property, but only the right of exclusive possession and enjoyment, for market purposes, during the existence of the market, and was therefore not in excess of its powers, and estopped the city and the purchaser from denying the validity of the sale.

ACTION to recover the amount of notes. The opinion states the case. The plaintiff had judgment below.

Graham Gordon, for appellant.

James S. McLane, for appellees.

ALVEY, J. This action was brought by the appellees against the appellant to recover the amount of certain promissory notes given for the purchase-money agreed to be paid for two butchers' stalls in the Richmond market, one of the public markets of the city of Baltimore.

It appears by the agreed statement of facts, that after due notice given of the time, place and terms of sale, fifty butchers' stalls, and a good many others of different kinds, all in the Richmond market, were offered for sale to the highest bidder, by and under the direction of the city comptroller, on the 12th of December, 1872. At this sale the appellant became the highest bidder for and purchaser of two of the butchers' stalls offered, the price bid for one being \$1,600 and for the other \$2,200. In compliance with the terms of sale, he paid the comptroller in cash the one-fourth of the purchase-money, and gave his six promissory notes for the remaining three-fourths, payable, respectively, at four, eight and twelve months from their date. At the time of paying the cash and passing the notes the appellant accepted a receipt from the comptroller describing the stalls, and stating that the stalls were sold subject to the

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ordinances that were then existing or that might thereafter be passed by the city regulating markets. The appellant at once entered into possession of the stalls, and continued to use and occupy them until sometime in the year 1875. During all this time he paid to the city comptroller, under the ordinances regulating the markets, the annual rent and license fee required to be paid.

At the trial below several prayers were offered by the appellant, all of which were rejected; but there are only two questions presented for discussion on this appeal: 1. Whether, as contended by the appellant, the appellee sold a larger interest or estate in the stalls than they were authorized by law to sell; and 2. Whether all the necessary preliminary conditions had been complied with to enable the appellees to make a valid sale of the stalls.

1. It is admitted that the city corporation is seized in fee simple of the Richmond market; that is to say, the corporation is seized in fee of the ground and the structures thereon, and that such ground was acquired under the act of 1833 (ch. 35), and the supplements thereto, for the purposes of such market and no other. This being the nature of the title held by the city corporation, the power to dispose of the stalls in that and the other markets of the city is given by the Public Local Code (art. 4, § 638), which is expressed thus: "The mayor and city council may lease, *sell* or dispose of the stalls and stands in any market, in any manner, and for any term they may think proper." And it is now contended, that inasmuch as the sale of the stalls to the appellant was without express limitation as to the duration of the right, it was a sale of the entire freehold interest and estate of the corporation in the stalls, and that as the corporation was required to hold the ground in trust for the public purposes of a market, such sale was in contravention of that special trust, and therefore it was made without legal authority. In other words, that the corporation has transcended its authority in making the sale of the stalls to the appellant.

This contention results, as we think, from a misconception of the nature of the right or estate acquired by the purchase of the stalls. The purchase of these stalls in a public market, like the purchase of a pew in a church, does not confer on the purchaser an absolute property, but a qualified right only. The right acquired is in the nature of an easement in, not a title to, a free-

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hold in the land ; and such right or easement is limited in duration to the existence of the market, and is to be understood as acquired subject to such changes and modifications in the market during its existence as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls, with their appendages, for the purposes of the market and none other. If the owner be disturbed in the possession of the stalls he may maintain case or trespass, according to the nature and circumstances of the injury, against the wrong-doer. But he cannot convert them to any other use than that for which they were sold, and in this use of them he is required to conform to the regulations of the market as prescribed by the ordinances of the city.

This is by analogy to the principles applied in respect to the rights of pew-holders; and, in our opinion, the analogy between those rights and the rights acquired in the stalls is sufficiently exact to make the principles applicable in the one case equally applicable in the other. See *Gay v. Baker*, 17 Mass. 425; 9 Am. Dec. 159; *Daniel v. Wood*, 1 Pick. 102; 11 Am. Dec. 151; *Howard v. First Parish, etc.*, 7 id. 138; *Jackson v. Ronnesville*, 5 Metc. 127; *Shaw v. Beveridge*, 3 Hill, 26; *Hinde v. Charlton*, L. R., 2 C. P. 104; Washb. on Eas. (3d ed.) 636.

This then being the nature and character of the right disposed of, it is clear, we think, there was no such excess in the estate sold as is supposed by the appellant. The city had express authority to sell or dispose of the stalls, and that in any manner and for any term it might think proper. Under this comprehensive authority, the sale might well be made as it was, without express limitation as to the duration of the right in the vendee. That is limited by the duration of the market; and while it was perfectly competent to the city to have sold for any shorter term, it was also competent to it to sell the stalls for the entire period of the existence of the market, and that is the effect of the sale to the appellant.

2. With respect to the second question, we think there should be no serious doubt. It appears that the sale of the stalls was made without previous ordinance, prescribing the manner of the sale, and for what terms the stalls should be sold. It is admitted that some of the stalls in the other markets of the city have been sold without previous ordinance, and that some have been sold under special ordinances directing the sale ; so that there has been no uniform practice upon the subject. But it is certainly true that there

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should be, in all cases, a previous ordinance directing the sales ; as by the terms of the power it is contemplated that the judgment and discretion of the mayor and city council should be exercised, as to the manner of making the sales, and the term for which the stalls should be sold. However, in a case like the present, where the act done is strictly within the powers of the corporation, and could have been authorized to be done in the manner it has actually been done, but the corporation has failed to comply with some formality or regulation which it should not have neglected, but which has in fact been omitted ; in such case, after both parties to the transaction have acted and proceeded as if all preliminary formalities and regulations had been complied with, and rights have attached, the corporation itself could not be heard in a court of justice to set up with a view of defeating the rights of the other party with whom it has dealt, that it had neglected to observe some formality or regulation that regularly it should have observed before entering into the transaction in question. This principle of estoppel is applicable to corporations generally (*Bargate v. Shortridge*, 5 H. L. Cas. 297; *Zabriskie v. Clev. Col. & Cin. R. R. Co.*, 23 How. 381); and it is equally applicable to a municipal corporation as to any other. *Moran v. Com'rs of Miami County*, 2 Black, 722; *Pendleton County v. Avery*, 13 Wall. 298, 305-6; *County of Randolph v. Post*, 93 U. S. 502, 513. If then the city corporation is estopped to question the validity of the sale to the appellant, upon the same principle he is equally estopped to deny the validity of such sale. He was bound to take notice of the authority and the circumstances under which the city comptroller acted; and if his rights acquired under the contract of purchase are placed beyond question by the corporation, and he is fully protected and secured therein, there can be no ground for declaring that the notes sued on were without consideration, or that the consideration has failed. The appellant was placed in full possession and enjoyment of the stalls, and he continued in such possession for nearly three years after the sale ; and it was from no defect of title, or disturbance on the part of the city that he ceased to use the stalls. Under the admitted facts of the case, we think the court was entirely correct in rejecting all the prayers offered by the appellant, and entering the judgment for the appellees. And that judgment will be affirmed.

Judgment affirmed.

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CARTER V. HOWE MACHINE COMPANY.

(51 Md. 290.)

Corporation — malicious prosecution — requisite proof of.

An action will lie against a corporation for malicious prosecution, * but where the prosecution set in motion by an employee of the corporation was a criminal proceeding for embezzlement, express authority or ratification and adoption by the corporation must be shown.

ACTION for malicious prosecution. The opinion states the facts. The defendant had judgment below.

Richard J. Gittings, for appellant.

Theophilus B. Horwitz and *Orville Horwitz*, for appellee, contended that an action for malicious prosecution cannot be maintained against a corporation. *Bank of Augusta v. Earle*, 13 Pet. 587; *Perrine v. Chesapeake and Delaware Canal Co.*, 9 How. 184; *Pearce v. Madison and Indiana R. R. Co., etc.*, 21 id. 443; *State v. Great Works Milling and Manufacturing Co.*, 20 Mc. 43; *Childs v. Bank of Missouri*, 17 Mo. 215; *Stevens v. Midland Counties Railway Co.*, 10 Exch. 354 (b); *Orr v. Bank of the U. S.*, 1 Ohio, 29 (t), 31 (b); *Foots v. City of Cincinnati*, 9 Ohio, 34.

ALVEY, J. This is an action for malicious prosecution, and for false imprisonment, instituted by the plaintiff against the defendant, a corporation incorporated by the State of Connecticut, and doing business in the State of Maryland.

The declaration alleges that the defendant, maliciously and without probable cause, caused and procured the plaintiff to be falsely charged before a justice of the peace with having fraudulently embezzled certain money and other property belonging to the defendant, and upon such charge procured the issue of a warrant and the arrest and imprisonment of the plaintiff, and that such charge was afterward abandoned and dismissed. And in a second count it is alleged that the defendant, by its servants, assaulted the

* See *Williams v. Planters' Ins. Co.*, post.

plaintiff, and unlawfully caused him to be arrested and imprisoned in jail.

To this declaration the defendant pleaded that it did not commit the wrongs alleged.

At the trial below there was but a single exception taken, and that but briefly states the proof. It states that the plaintiff offered evidence tending to maintain and prove the issue joined ; and it is also stated that the defendant offered evidence tending to prove the issue on its part joined. It is also stated that the plaintiff was arrested on the oath of an employee of the defendant, and that the defendant was at the time, and so continued, a corporation, duly chartered by the State of Connecticut, exercising its franchises in this State, having an office in the city of Baltimore.

Upon the evidence, the court was asked to instruct the jury, that if they found the defendant to be a corporation, the plaintiff could not recover ; and that instruction was given.

Whether this instruction is maintainable is the question presented ; and the only question that has been argued at the bar is, whether an action for malicious prosecution can be maintained against a corporation aggregate.

This question was argued in the case of *Medcalf v. Brooklyn Life Ins. Co.*, 45 Md. 189, but was not decided because it was found to be unnecessary to the judgment pronounced in that case. It does not appear, so far as our investigation has extended, that this precise question has ever been expressly decided by the English courts. In the case of *Stevens v. Midland Counties R. Co.*, 10 Exch. 352, the question was to some extent considered, but it was left undecided. ALDERSON, B., threw out a doubt whether such an action could, in any case, be maintained against a corporation aggregate inasmuch as such action is predicated of an act done *malo animo*. and according to his opinion, a corporation can have no *animus*. But the other barons, while reserving their opinion upon this point, rather intimated that a state of case might exist where such form of action might be maintained against a corporation. And it would seem to be now clear, whatever may have been the former state of judicial opinion upon the subject, that corporations are liable for all acts, whether willful or malicious, of their agents or servants done in the course of their employment. Hence it has been repeatedly decided that corporations are liable in actions for assault and battery, and false imprisonment, committed by their servants,

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and for false representation, and for libel, as well as for all consequences of the negligent or unskillful acts of their servants, within the scope and course of their employment; and it would appear that actions for such injuries may be maintained against corporations aggregate in any case where, under similar circumstances, such actions could be sustained against individuals for the acts of their servants. The principles and reasoning upon which such actions have been sustained against corporations it is unnecessary here to repeat. We need not do more than refer to the familiar cases of *Phila., Wilm. & Ballo. R. Co. v. Quigley*, 21 How. 202; *Whitfield v. S. E. R. Co.*, El. Bl. & El. 121; *Railway Co. v. Broom*, 6 Exch. 314; *Goff v. G. N. R. Co.*, 3 El. & El. 672. The two first of these cases were actions for libel, and the two last were for assaults and false imprisonment. If such actions, founded on wrongful acts done intentionally, without just cause or excuse (the legal definition of malice), can be sustained, why should there be any difficulty in maintaining the action for malicious prosecution?

Judge COOLEY, in his recent work on Torts, page 121, thinks that the same reasons that sustain an action against a corporation for a libel will sustain one for a malicious prosecution; and though there are cases which hold that no action can be sustained, the better doctrine, he thinks, is that laid down by some other courts which have sustained the action. The cases to which he refers as sustaining the action are *Vance v. Erie R. Co.*, 32 N. J. 334; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Copley v. Sewing Machine Co.*, 2 Woods, 494; *Fenton v. Sewing Machine Co.*, 9 Phila. 189, and *Walker v. S. E. Railway Co.*, L. R., 5 C. P. 640. In the latter case, the action was for assault, false imprisonment, and malicious prosecution, and the verdict being for the plaintiff with separate damages assessed on each head of complaint, the defendant, under leave reserved, moved to enter the verdict on the count for malicious prosecution for the defendant, upon the ground that it was unsupported by the evidence; and the Court of Common Pleas being of that opinion, the verdict was entered for the defendant accordingly; the court holding that the evidence failed to show authority in the servant to bind the corporation for the acts in question. There was no positive or express assertion by the court that the action could have been sustained if the evidence had been different; and therefore that case is not an express authority in sup-

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port of the right to maintain the action. The cases cited as opposed to the right to maintain the action at all, as against a corporation, are *Childs v. Bank of Missouri*, 17 Mo. 215, and *Owsley v. Montgomery, etc, R. Co.*, 37 Ala. 560. In this conflict of authority it would seem that the question had been regarded as one not free from difficulty. But upon the whole, we quite agree with Judge COOLEY, that for the same reason that actions for libel or for false imprisonment may be maintained against a corporation, an action for malicious prosecution may be maintained against it. They all alike involve the element of malice, and this court has held upon more than one occasion that express malice or malice in fact may be imputed to a corporation for the willful and violent acts of its servants in the course of their employment. *B. & O. R. Co. v. Blocher*, 27 Md. 287; *Balt. & Y. Turnpike Co. v. Boone*, 45 id. 344.

But a decision of the question of the abstract right to maintain the action does not embrace the whole difficulty of these cases. The question, as far as for what acts of the agent or servant the corporation is liable, is often one of great difficulty, and which requires great care in observing the proper limitations of the authority under which the agent or servant acts. While on the one hand, it is right to consider the agents and servants of corporations as clothed with liberal discretion in the exercise of the authority given them, and to hold the corporations liable for all acts done within the limits of that discretion, on the other hand, it is but just and right that corporations and their innocent stockholders should not be made to suffer the consequences of the wrongful acts of such agents and servants acting beyond the limits of their authority. If therefore, property be intrusted to an agent or servant for sale or safe-keeping, there is clearly an implied authority to do all such things as may be proper and necessary for the protection of that property; or if a servant be assigned to a position requiring the performance of certain duties, he has an implied authority to do all such things as may be required to enable him to perform those duties. And for all acts done within the scope of the employment and the limits of the implied authority, the master is liable, however erroneous, mistaken or malicious such acts may be; but for acts done beyond that limit the corporation cannot be made liable, unless express authority be shown, or there be subsequent adoption or ratification of the act complained of. Where the implied authority ends, and the necessity exists for showing an express authority in

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the servant, in order to hold the corporation liable for the acts of the servant, may be best illustrated by referring to some of the decided cases.

In the case of *Poullon v. Lond. & S. W. R. Co.*, L. R., 2 Q. B. 534, where it appeared that a station-master of the defendant arrested a person travelling by the defendant's road in charge of a horse for not paying for the carriage of the animal on demand, and there was no power in the corporation by law to arrest a person for such non-payment, but only to detain the goods, it was held that no authority could be implied to the station-master, and that in the absence of an express authority, or a subsequent ratification of the act, the corporation could not be held responsible. And in the case of *Allen v. Lond. & S. W. R. Co.*, L. R., 6 Q. B. 65, where a clerk in the service of the corporation, whose duty it was to issue tickets to passengers and receive the money, and keep it in a till under his charge, arrested and gave into custody the plaintiff, whom he suspected of attempting to rob the till, it was held that the clerk had no implied authority for such act, after the attempt had ceased, the arrest not being necessary for the protection of the company's property; and consequently the corporation was not liable. And in the course of his opinion, Mr. Justice BLACKBURN stated the principle, and the distinction upon which the case was decided, thus: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not any thing done with reference to the property; it is done merely for the purpose of vindicating justice." The same principle is very clearly enunciated by the Court of Common Pleas, in deciding the case of *Edwards v. Lond. & N. W. R. Co.*, L. R., 5 C. P. 445.

The principle of the cases just referred to is the same as that upon which the case of *Mali v. Lord*, 39 N. Y. 381, was decided. In that case, the superintendent and a clerk employed in the defendants' store, called into the store of the defendants, a policeman, and directed him to arrest and examine the person of a lady sus-

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pected of stealing goods, which was done without the knowledge or any express authority of the defendants ; and it was held, in a carefully considered opinion by the Court of Appeals of New York, that there was no implied authority in the superintendent or the clerk to do the act complained of, and that the defendants, the employers, were not liable for the wrong.

From these authorities it is quite clear that in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover, it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's money or goods ; and before the corporation can be made liable for such an act, it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation.

It follows that this court is of opinion that there was error in the ruling of the court below, and the judgment must therefore be reversed, and a new trial ordered.

Judgment reversed, and new trial awarded.

BALTIMORE AND OHIO RAILROAD COMPANY V. POTOMAC COAL CO.

(51 Md. 327.)

Contract — for transportation — license — revocability.

A railroad company wrote a letter to a coal company, agreeing that if the latter would place its own coal cars on the road of the former, for transportation of coal from P. to B., the former would allow one-fourth of one per cent per ton per mile for such cars so used, would indemnify the coal company for damages to such cars caused by the fault of the railroad company, and would keep the cars in repair, charging the actual cost thereof, but would not agree for prompt transit, nor to give a number of cars equal to that so furnished. No term was specified for the continuance of the ar

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arrangement. The coal company thereupon provided a large number of cars at a large expense, which were so used for ten years. Then, at the request of the coal company, the privilege was indefinitely and in like manner extended, on the same conditions, in consequence of which the coal company incurred great expense. Two years later the railroad company notified the coal company that the allowance would be reduced to one-eighth of one per cent. In an action by the railroad company to recover the difference in tolls and freight for a subsequent period, *held*, that the arrangement evidenced by the letters did not constitute a contract, but was a mere revocable license.

ACTION for freight. The opinion states the case. The defendant had judgment below.

John K. Cowen and Henry E. Woolen, for appellant.

Wm. Shepard Bryan, for appellee. Neither party can rescind a contract at his pleasure, unless it contains a stipulation authorizing him to do so. Add. on Cont. 975; *Great Northern Railroad Co. v. Manchester, Sheffield, etc., Railroad Co.*, 5 DeG. & Sm. 138; *Fowle v. Bigelow*, 10 Mass. 319; *Stirling v. Maitland*, 5 Best & Smith; *McIntyre v. Belcher*, 108 Eng. C. L. R. 664. If the convention between these parties is a mere license, it has caused the outlay of a great deal of money with a view to the enjoyment of it, and it cannot be withdrawn without previously tendering the expense which the grantee has incurred under it. *Addison v. Hack*, 2 Gill, 227-S, and cases therein cited; *Liggins v. Inge*, 7 Bing. 682 (20 Eng. C. L. R.); *Rerick v. Kern*, 14 S. & R. 271; 16 Am. Dec. 497.

ROBINSON, J. This suit was brought to recover freight claimed to be due by the appellee, on account of coal transported over the road of the appellant.

On March 1st, 1864, the following letter was sent to the appellee :

“NEWELL CLARK, Esq. :

“*Dear Sir*—The president directs me to reply to your communication of yesterday, and to state that provided you will place your own cars upon the Baltimore and Ohio railroad, to be used in the transportation of coal from Piedmont to Baltimore, we will agree to the following conditions :

“1st. To allow one-fourth of one per cent per ton per mile for cars so used.

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“ 2d. To make good any damage to the cars caused by accidents, the fault of the Baltimore and Ohio Railroad Company. This obligation does not include any damages which may be done by the military forces either of the United States or of the Confederates.

“ 3d. To keep the cars in repair, and to charge for this service the actual cost thereof as charged in first-class shops.

“ 4th. We can make no actual agreement to give your cars prompt transit over our road. We are now increasing our motive power, and hope to be able to move promptly all cars used in coal trade, but in the event of our inability to do so, we will furnish to your cars a proportion of the whole amount of power used in the general coal business. We cannot agree to give you a number of cars equal to that you furnish.

“ Yours respectfully,

“ JNO. KING, Jr., *Auditor.*”

After the receipt of this letter the appellee provided one hundred coal cars, at an expense of about \$75,000, and these cars have been used ever since by the appellant for the transportation of the appellee's coal, and have been kept in repair by the appellant at the expense of the appellee.

On the 6th of March, 1874, the appellee sent the following letter to the appellant:

“ OFFICE POTOMAC COAL CO., No. 60 DEVON- }
SHIRE ST., BOSTON, 6th March, 1874. } ”

“ JNO. KING, Jr., Vice-President of the Balt. & Ohio R. R. Co.,
Baltimore:

“ *Dear Sir* — The Potomac Coal Company contemplates the purchase of some additional coal land, and may therefore wish to increase their business, I would therefore request for our company the privilege of putting on some additional hoppers on same conditions as agreed to in your letter of March, 1864, to Mr. Newell Clark, acting director of Potomac Coal Company at that time. Copy of that agreement please find inclosed. As we are to have a meeting on Wednesday next, your reply previous to that will much oblige

“ Respectfully, yours,

“ GILMAN CURRIER, *Prest.*,

“ per C. CHADBOURNE.”

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To this letter the appellant sent the following reply:

“BALTIMORE, *March 11th*, 1874.

“GILMAN CURRIER, Esq.:

“*Dear Sir*—Referring to your favor of 6th inst., President King directs me to reply that we will extend to your company the privilege of placing some additional hopper cars upon our line, upon the same conditions agreed to in his letter of March 1st, 1864, to Mr. Newell Clark.

“Yours, truly,

“N. GUILFORD, *G. F. A.*”

After the receipt of this letter the appellee made further purchases of valuable coal lands, and erected upon them valuable improvements, and excavated and raised from said lands some of the coal transported by the appellant, for which tolls are demanded in this suit.

In April, 1876, the appellant notified the appellee that the allowance for the use of its coal cars would be reduced to one-eighth of one per cent per ton per mile.

The appellee contends that the letters of March 1st, 1864, and March 11th, 1874, constitute a perpetual contract, by which the railroad company is obliged to use for all time the cars furnished by the appellee, and to allow therefor one-fourth of one per cent per ton per mile.

On the other hand, it is contended that the privilege granted to the appellee is a mere license revocable at the will of the appellant.

It strikes us at the outset, as it did the counsel for the appellant, that if this is to be considered a contract binding for all time, it is strange that it should take the form of a letter written by the auditor of one company, in reply to an oral communication made by the managing director of the other. Contracts of so much importance and of such magnitude are not usually made in this loose and informal manner. Yet it was competent nevertheless for the parties to make a contract even of this character by letter, and if such appears to have been their intention it is as binding as if it had been made in a more formal and solemn manner. The true interpretation of all instruments is to make them speak the common intention of the parties at the time they were made. If this intention is expressed in plain and unambiguous terms there is no room for construction, and the parties must be presumed to have.

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intended what they have expressed. On the other hand, if the language is somewhat obscure and ambiguous, we may look not only to the face of the instrument itself, but also to the circumstances under which it was made, and the motives that led to its adoption.

It is not contended that the railroad company has, in express terms, agreed to use the cars furnished by the appellee for all time, at a certain stipulated price. There is nothing in the letter of March 1st, 1864, to justify this contention, because, although the appellant does agree to allow the appellee to provide cars for the transportation of its own coal, and to allow a certain sum per ton per mile for the use of the cars, there is not a word to be found in the letter about the duration of the agreement or privilege, or the terms upon which it is to be terminated. But the argument is, the appellee being the owner of large and valuable coal mines, and being permanently engaged in the business of mining coal for market, it is unreasonable to suppose that it would have incurred the expense of providing cars to be used in the transportation of its coal, under a privilege or license revocable at the will of the railroad company.

On the other hand, it may be said that the letter of March, 1864, was written during the late civil war, and although the appellant might be willing under the then existing circumstances to grant or extend to the appellee the privilege requested, it is equally unreasonable to suppose that the railroad company intended thereby to make a contract binding for all time. That under the then existing charges for freight, the appellant might very well afford to allow the appellee one-fourth of one per cent per ton per mile, yet if freights should in the future decline, arising from the competition of other roads, or from other causes, the sum thus allowed might in fact be equal to the entire profits earned by the railroad in the transportation of the appellee's coal.

Much may be said therefore on both sides, in regard to the reasonableness or unreasonableness of the different constructions to be put on the letter of March 1st, 1864.

There is one thing, however, about which there can be no dispute; the basis of the agreement was the self interests of the respective parties. The appellee was anxious to get its coal to market, and the appellant was unable to furnish the cars necessary for its transportation. Under these circumstances it might be to the interest of the coal company to provide its own cars, and on the other

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hand, it would be to the interest of the railroad company to allow a certain proportion of the freight for the use of the cars by which the coal was shipped to market. Nothing was said by either party in regard to the duration of the agreement, and in the absence of a stipulation of some kind in this respect, it is but fair to presume that it was to continue so long, and no longer than their respective interests should require. If the appellee should find one-quarter of one per cent not enough, or if it could make better terms with another road, it was at liberty to withdraw the cars placed on the road of the appellant, and if the latter should find the rate too much, more than it could afford to pay, it had the right to notify the appellee and thus revoke the license.

But be this as it may, there is nothing in the letter of March 1st, 1864, or the circumstances under which it was written, to satisfy us the appellant ever intended to make a perpetual contract. And this view is strengthened by the letter of March 6, 1874, written subsequently by the appellee, requesting the privilege of putting on some additional cars, and the answer of the appellant saying we will extend the privilege. Not one word about a contract or rights under a contract; the language is "privilege," and the favor asked is the extension of the privilege. This is not certainly the language of parties in making a contract to bind each other forever, and in regard to a matter of so much importance to both.

But apart from these views, there is another objection, and one which, in our opinion, is fatal to the contention of the appellee. It is essential to the validity of every contract of this character, that there should be a mutuality of obligation. A contract is not binding on one of the parties, unless it is binding on the other.

Here, there is no obligation of any kind resting upon the appellee, for the breach of which an action would lie at the instance of the appellant. It was not obliged either to furnish the cars, nor to keep them on the road after they were furnished. It might put them on the road one day, and take them off the next, just as its own interests might require. Cases are to be found, it is true, of executed contracts, where one has received the benefit of the consideration for which he bargained, and in which it is no answer to an action to say, the plaintiff was not bound by the terms of the original contract to do the act, and that there was therefore no mutuality of obligation. As for instance, in cases put in the books :

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“Suppose I say if you will furnish goods to a third person I will guarantee the payment, there you are not bound to furnish the goods, yet if you do furnish them in pursuance of that contract, you may sue me upon the guaranty.” *Fishmonger Co. v. Robertson*, 5 M. & G. 131; *Robinson v. Jones*, 17 L. J. Ex. 36; *Mills v. Blackall*, 11 Q. B. 356.

This, however, is not the case of an executed contract, the consideration of which has been received by the railroad company, for although the coal company did furnish cars for the transportation of its own coal, yet it has the right, at any time, to withdraw them from the road, and for so doing there is no breach of obligation on its part.

But it is also argued, that even conceding this to be a license, it cannot now be revoked, because the coal company has, upon the faith of it, expended money in providing cars, which were necessary to the enjoyment of the license granted.

There is a well-recognized distinction between a mere license revocable at will, and a license coupled with an interest, which is irrevocable so long as the interest continues.

Many decisions are to be found, where one has erected buildings or constructed works of a permanent character under a license upon the land of another, in which it has been held that the license is irrevocable, or that it cannot be revoked without adequate compensation to the licensee. Such are the cases relied on by the appellee, and others of the like character will be found in 2 Am. Lead. Cas. (4th ed.) 733, etc.

These cases, however, are based upon a contract, either express or implied, that the licensee shall be permitted to use and enjoy the buildings erected and works constructed; or upon the doctrine of estoppel, whereby one will not be permitted to repudiate his own acts or conduct upon the faith of which another has acted. This case, however, does not come within the operation of these principles. There was no agreement here, either express or implied, that the coal company should enjoy the privilege extended to it, one day longer than the mutual interests of the parties should require.

And although the appellee may have expended money in providing coal cars, there is nothing in the record to show that it was done upon the faith of an irrevocable license. The cars do not belong to, nor are they in any sense attached to, the road of the appellant, and although the appellee might suffer loss to some

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extent by the revocation of the license, it does not necessarily follow that the cars would thereby be without any value whatever.

It follows from what we have said that the judgment must be reversed, and the cause remanded, to the end that judgment may be entered by the court below in conformity with this opinion.

Judgment reversed, and cause remanded.

ROKES V. AMAZON INSURANCE COMPANY.

(51 Md. 512.)

Insurance — fire — waiver of proofs of loss.

The requirement in a fire policy of preliminary proofs of loss within a certain time may be waived by the insurer, and this, notwithstanding a provision that "no waiver or modification of any of the terms or conditions of this policy shall be made in any event," that provision having reference only to the terms and conditions which were essential to the contract of insurance.

ACTION on a policy of fire insurance. The opinion states the facts. The defendant had judgment below.

John H. Handy, for appellant.

Thomas J. Morris and *Edward Otis Hinkley*, for appellee.

ROBINSON, J. This is an action on a policy issued by the appellee, insuring the property of the appellant against loss by fire.

The policy requires that proofs of loss shall be furnished in writing immediately after the fire. Immediately, as here used, means within a reasonable time; and what is a reasonable time must of course depend upon the facts and circumstances of each particular case. *Cashan v. N. W. Nat. Ins. Co.*, 5 Biss. 476; *Edwards v. Lycoming County Mut. Ins. Co.*, 75 Penn. St. 378.

Admitting, however, for the purposes of this case, that proofs of loss were not furnished within the time prescribed by the policy, the main question is, whether there is any evidence legally sufficient to show a waiver of this condition on the part of the appellee.

It is conceded that where proofs of loss are furnished in time, and such proofs are defective, if the insurer puts his refusal to pay

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on other and distinct grounds, he will be held to have waived all objections to such defects; and will not be permitted to rely upon them in a suit upon the policy. Fair dealing in such cases requires that the insurer should make known his objections when the proofs are furnished, in order that the insured may correct the same within the time prescribed by the policy.

But it is argued that the failure to furnish the proofs within time stands upon different grounds, because the insured having by his own default forfeited the right to recover on the policy, he is not in any manner injured or prejudiced by the subsequent acts and conduct of the insurer. And it is contended, therefore, that a new consideration or an express agreement on the part of the insurer is necessary to renew or give vitality to the policy.

It was said by EARL, commissioner, in *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 N. Y. 502, that the law of waiver was based upon the doctrine of estoppel, and "that in the absence of some consideration for a waiver, or some valid modification of the agreement between the parties, there could be no such thing as waiver of a condition precedent, except there be in the case an element of estoppel;" in other words, unless the failure to furnish the proofs within the time prescribed by the policy had been occasioned, in some way, by the acts or conduct of the insurer. The other commissioners, however, did not concur with the learned judge in his views upon the law of waiver, and the case was decided on other grounds. See, also, *Beatty v. Lycoming Ins. Co.*, 66 Penn. St. 9; s. c., 5 Am. Rep. 318.

We have carefully examined all the cases within our reach on this branch of the case, and are of opinion that the contention of the appellee is unsupported either by principle or by the weight of authority.

Preliminary proofs are required for the benefit solely of the insurer, in order that he may ascertain the nature, extent and character of the loss; and the condition in the policy in respect thereof, being inserted for his benefit, there is no reason why he may not waive or extend the time within which such proofs are to be furnished. Nor is it necessary to prove an express agreement to waive. On the contrary, it may be inferred from the acts and conduct of the insurer inconsistent with an intention to insist upon the strict performance of the condition. *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Phillips v. Protection*

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Ins. Co., 14 Mo. 220 ; *Owens v. Farmers' Joint Stock Co.*, 57 Barb. 518 ; *Graves v. Wash. Incor. Ins. Co.*, 12 Allen, 391 ; *Dohn v. Farmers' Joint Stock Co.*, 5 Lans. 275.

[Omitting a question of fact.]

In regard to the clause in the policy that provides "no waiver or modification of any of the terms or conditions of this policy shall be made in any event," it is sufficient to say that it refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated conditions—and that it has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing proofs of loss. *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102 ; s. c., 11 Am. Rep. 469.

We are of opinion, therefore, the court below erred in granting the defendant's prayer that there was no evidence of a waiver ; and erred also in refusing the prayer offered by the plaintiff.

Judgment reversed, and new trial awarded.

Judgment reversed.

HARDY V. CHESAPEAKE BANK.

(51 Md. 562.)

Bank—payment of check forged by drawer's agent—laches—estoppel.

A confidential clerk, having charge of his employer's check-book and bank-book, and whose duty it was to enter all checks on one side of the bank-book, the bank entering all deposits on the other, forged fourteen checks of his employer, at different times, the bank paid them, and he entered them in the bank-book. The bank returned such checks with the book, striking the balances after the payment of the first five, and again after the payment of the other nine. The employer did not discover the fraud until after the payment of all the forged checks. In an action by him against the bank to recover this amount, *held*, that he was not absolutely estopped by apparent acquiescence in the account thus stated in the bank-book, and could recover unless he had been guilty of negligence in discovering the fraud, and unless the bank, in paying the later forged checks, had relied on his apparent acquiescence of the payment of the earlier ones *

*See *Welsh v. German American Bank* (73 N. Y. 424), 20 Am. Rep. 175.

ACTION for balance of bank account. The opinion states the case. The plaintiff had judgment in part, and appealed.

R. S. Matthews and S. T. Wallis, for appellants.

George Hawkins Williams and I. Nevitt Steele, for appellee.

ALVEY, J. This action was instituted by the appellants against the appellee to recover an alleged balance due on bank account. The appellants were customers of and depositors in the bank of the appellee; and the appellants having been notified that their account was overdrawn, upon investigation, they discovered, as they allege, that a considerable amount that had been paid out on their account had been paid out on forged checks, and that, by a proper balancing of the account as of the 10th of October, 1872, there was a balance of \$6,113.37 then due them; and it was to recover that amount that this action was instituted.

In the course of the trial below, several questions were raised and decided; some upon the introduction of the evidence, and others upon the prayers offered by the parties for instructions to the jury. We shall first consider the questions raised by the prayers, so far as those questions are presented by the exceptions taken by the appellants.

At the trial below, there were fourteen checks produced which were alleged to be forgeries on the appellants, and which had been paid by the appellee. These checks were all entered in the appellants' bank-book, containing the account between the appellants and the appellee. Five of these checks, amounting to \$860, were included among the checks entered in the bank-book at the time it was written up and balanced on the 13th of July, 1873; and the remaining nine checks, amounting to \$1,296, were dated, presented and paid, between the 13th of July, 1873, and the 6th of October, 1873, at which latter date the bank-book was again written up and balanced. Upon each occasion of writing up and balancing the bank-book, the cancelled checks were returned to the appellants, and the balance ascertained carried forward to their credit. Holmes, the alleged forger, was the confidential clerk and book-keeper of the appellants, and all the checks produced and alleged to have been forged were taken from the regular check-book of the appellants, and were filled up in the handwriting of Holmes. He was

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intrusted with the care of the appellants' bank-book, their check-book, and with the checks returned by the bank ; and he entered in the bank-book all the checks paid by the bank, except the four last. It was his business to enter the checks in the bank-book and to superintend the writing up and balancing the account with the bank, and to keep himself informed of the true state of the account. It was not until about the 10th of October, 1873, upon being notified that their account with the bank had been overdrawn, that the appellants, as they allege, first discovered that Holmes had forged checks and drawn money on their account.

Upon proof of these facts, the appellants claim, that under well-established principles of law, they were entitled to recover the entire amount of the fourteen checks produced, if in fact they were forgeries ; and that the court below was in error in refusing to grant their first prayer, which asserted this right. On the other hand, the appellee sought to maintain two distinct grounds of defense ; first, that the checks alleged to be forged were not forged at all, but were the genuine checks of the appellants ; and second, that assuming the checks to be forged, there was such negligence, and apparent acquiescence, on the part of the appellants, as to induce the belief that the alleged forged checks paid after the 13th of July, 1873, were genuine, and that therefore the appellants are estopped to question the genuineness of the checks, or the authority of Holmes to draw them in the name of the appellants.

[Omitting the first point.]

But with respect to the second ground of defense, the appellee, by its second prayer, which was granted as a qualification of the first prayer offered by the appellants, obtained an instruction to the jury, that though the appellants might be entitled to recover the amount of the first five of the fourteen checks alleged to have been forged, being those prior to the 13th of July, 1873, yet in respect to the other nine, the acceptance of the balanced account in the bank-book by the appellants, containing entries made by Holmes of the forged checks, with the cancelled checks upon which such balance was struck, and the continuous dealing with respect to such balance, and the condition of the account—the bank in good faith paying the checks on similar signatures, to those on checks embraced in the former settlement of the account, without suggestion or intimation from the appellants that any thing was wrong—are facts sufficient to estop the appellants to question the genuineness of the

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checks, or the authority of Holmes to draw them in the form in which they were presented. It was to the granting of this prayer, as well as to the refusal to grant the first prayer offered by the appellants without qualification that the latter excepted.

1. It is now perfectly well settled, that the relation between banker and customer, who pays money into the bank, or to whose credit money is received there on deposit, is the ordinary relation of debtor and creditor; and that when the bank receives the money as an ordinary deposit and gives credit to the depositor, the money becomes the funds of the bank, and may be used by it as any other funds to which it may be entitled. It is accountable for the deposits that it may receive as debtor, and in respect to ordinary deposits there is an implied agreement between the bank and the depositor that the checks of the latter will be honored to the extent of the funds standing to his credit. *Horwitz v. Ellinger*, 51 Md. 492, 503; *Foley v. Hill*, 2 C. & Fin. 28; *Thompson v. Riggs*, 5 Wall. 663; *Bank of the Republic v. Millard*, 10 id. 152, 155. There is no question of trust, therefore, between the parties, but their relation is purely a legal one; and if the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril, and pays out its own funds, and not those of the depositor. It is in view of this relation of the parties, and of their rights and obligations, that the principle is universally maintained, that banks and bankers are bound to know the signatures of their customers, and that they pay checks purporting to be drawn by them at their peril. *Com. & Farm. Nat. Bank v. First Nat. Bank*, 30 Md. 11. No right or title can be legally claimed through a forgery; and the possession by the bank of a forged check upon which money has been paid affords of itself no ground for claim of credit in account as against the party whose name has been forged.

But while these are the strict and necessary rules as against banks and bankers, their operation may be varied by the acts and conduct of the parties for whose benefit and protection they are intended to be enforced. If, for instance, a customer of a bank, having a deposit account, and who is in the habit of drawing checks upon that account, should, by words or acts, cause the bank, the latter

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acting upon such reasonable grounds as prudent business men generally act, to make payment on a forged check, such customer would not be allowed, as against the bank, to set up the forgery that he by his conduct had induced the bank to act on as a genuine check. This is the principle sought to be applied by the second prayer of the appellee ; the latter insisting that it had been misled and induced to honor and pay the checks drawn by Holmes, by the negligent conduct and apparent acquiescence of the appellants. But it is objected by the appellants that the prayer as granted by the court is fatally defective, because of the omission to submit to the jury the question, whether the appellants were, in point of fact, guilty of negligence in respect to the bank account, and whether, if there was negligence at all, that negligence was of a character to mislead, and did actually mislead the appellee, and induced it to act upon the belief that as all the checks paid prior to the 13th of July, 1873, and which had been returned to the appellants, remained without objection, all checks similarly drawn and presented for payment after that date were unobjectionable. The instruction certainly does omit to put this question distinctly to the jury, and whether it be for that reason defective remains to be determined.

It must be borne in mind that the appellants were not bound at their peril and under all circumstances to detect the forgery. They were simply bound to refrain from doing any act that would reasonably have the effect of misleading the appellee to its hurt or injury, and not fail to do any act that positive duty required them to do for the protection of the appellee. When the bank account was balanced in the bank-book on the 13th of July, 1873, and the book and the cancelled checks were returned to the appellants, after the lapse of a reasonable time (within which the checks and account could have been examined and compared), without objection being made, the presumption arose that the account as balanced, and also the checks charged therein, were all correct. This presumption, however, proceeds upon the ground simply of an implied admission, and is only *prima facie* in its effect. *Wiggins v. Burkham*, 10 Wall. 129. Such presumption arises from the natural and usual habits of careful business men to examine and scrutinize such accounts when rendered; but the presumption is liable to be repelled, by showing that the error or fraud complained of was not discoverable by the exercise of reasonable care and diligence, or that there was

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no such appearance of things as to excite the suspicion of a reasonable man, or that for any reason, the party had not had an opportunity to examine the account. *Weisser v. Denison*, 10 N. Y. 68, 76; *Nat. Bank v. Whitman*, 94 U. S. 343, 346.

It is insisted, however, that as Holmes was the confidential clerk of the appellants, and was intrusted to make the entry of all checks in the bank-book, and did make the entries as well of the forged checks as all others, he acted as the agent of the appellants, and his acts and his knowledge in respect to these entries are to be taken as the acts and the knowledge of the appellants themselves; and upon this imputed knowledge that they should be taken to have acquiesced in the entries of the forged checks.

And therefore, as the fact of knowledge on the part of the appellants, it was only necessary that the jury should be required to find that the forged checks were entered in the bank-book by Holmes, the alleged forger, in order to find and conclude the appellants. But it is clear, we think, such position can neither be supported upon principle or authority.

It is conceded that Holmes did not act as agent in drawing the checks; and if the appellants are not liable in respect to the fraudulent drawing, we do not perceive upon what principle they can be bound or made liable in respect to the fraudulent entry of those checks in the bank-book. Holmes was not an agent for any such purpose, and the principle is too well settled to require the citation of authorities for its support, that the principal is bound by the acts of his agent only so far as the agent acts within the limits and scope of his employment. The fraudulent knowledge of the agent in regard to acts and transactions outside of and beyond his employment cannot be imputed to his principal. To do so would work the grossest injustice, and lead to the most anomalous consequences. In the case of the *Manhattan Co. v. Lydig*, 4 Johns. 377, this question was distinctly presented and decided. In that case, it was contended that the fraudulent entries in the ledger of the bank, and those in the customer's bank-book, made by the book-keeper of the bank, were acts that bound the bank. But the court expressly decided otherwise. So, in the case of *Weisser v. Denison*, 10 N. Y. 68, a case in many of its circumstances almost exactly similar to the circumstances of the present case, there it was insisted as here, that as the confidential clerk of the plaintiff settled the account with the bank as the agent of the plaintiff, the agent

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having knowledge of the forgeries, and that the charges in dispute were based upon such forgeries, the principal was affected by the knowledge of the agent, and should be deemed to have acted in person, with full knowledge of all the facts, and thus to have acquiesced in the payment of the forged checks from his funds. But the court was explicit in overruling the position, citing the authorities in support of their ruling. Indeed, if the position contended for here by the appellee be maintainable, the same principle would have afforded a short answer to the demands of the plaintiffs in many of the cases that have been referred to in argument; but in none of them was it intimated by the courts that such a doctrine could be supported. Moreover, if the principle contended for by the appellee be sound, it is a little difficult to understand why it should have been conceded by the appellee's second prayer, that recovery could be had for the first five of the forged checks; for if the acts and knowledge of the agent in making the entries of those checks in the bank-book could be properly imputed to the appellants, irrespective of knowledge in fact, those entries would amount to a ratification and adoption of the acts of Holmes in drawing those checks, as well as those dated subsequent to the 13th of July, 1873.

We therefore think that the jury should have been required to find either that the appellants had knowledge in fact that the forgeries had been committed, or that from carelessness and indifference to the rights of others, they failed to inform themselves from sources of information readily accessible to them, and which, by the exercise of ordinary diligence as business men, would have disclosed to them the fact that the forgeries had been committed. If such facts be found to exist, then it must be also found, in order to work an estoppel, that the appellee acted, in honoring and paying the nine checks in question, in reference to the conduct of the appellants in failing to make known an objection to the account as stated and balanced in the bank-book on the 13th of July, 1873, and that such omission and neglect of the appellants did in fact mislead the appellee into the error of paying the nine forged checks now in dispute.

This doctrine of estoppel *in pais* is applied in a great variety of circumstances, but its great object is to prevent injustice being done, where one party has been led into error by the fault or fraud of the other. It is a most valuable doctrine for the promotion of

justice; but it can have no application except where the party invoking it can show that he has been induced to act or refrain from acting, by the acts or conduct of the adverse party, under circumstances that would naturally and rationally influence ordinary men. It can therefore only be set up and relied on by a party who has been actually misled to his injury; for if not so misled he can have no ground for the protection that the principle affords. The doctrine has been applied in many cases by the court, though under circumstances unlike those of the present case. *Alexander v. Walter*, 8 Gill, 252; *Homer v. Grosholz*, 38 Md. 520, 526; *Bramble v. State*, 41 id. 435, 441; *Brown, Lancaster & Co. v. Howard Fire Ins. Co.*, 42 id. 385; s. c., 20 Am. Rep. 90; *Hamilton v. Central O. R. Co.*, 44 Md. 551, 561. In all these cases the essential conditions of the application of the principle as heretofore stated have been recognized. In England, the leading case upon the subject is *Pickard v. Sears*, 6 Ad. & El. 469; but the doctrine would appear to be more clearly and comprehensively stated in *Freeman v. Cook*, 2 Exch. 654, than in any previous case. In that case, PARKS, B., in a carefully expressed judgment for the whole court, stated the doctrine in these terms: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect." This statement of the doctrine has been fully approved and adopted in subsequent cases, after elaborate discussion, as appears from the case of *Swan v. N. B. Australasian Co.*, 2 H. & Colt. 175, 181, decided in the Exchequer, and again in the case of *Carr v. L. N. W. R. Co.*, L. R., 10 C. P. 307. In the latter case, the principle was formulated in respect to acts of negligence and omission, thus: "If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterward, as against the first, to show that the state of facts referred to did not exist." And in the recent case of *Arnold v. The Banks*, L. R., 1 C. P. Div.

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578, where the principle was extensively discussed as to its application to the negligent conduct of the party suing, it was held, following the previous cases, that negligence, to create an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public. What is such duty may not in all cases be easy to determine, but we think it not too much to say, that in a case like the present there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow in such cases, in the examination and comparison of the debits and credits contained in his bank or pass-book, in order to detect any errors or mistakes therein. More than this, under ordinary circumstances, could not be required.

And having said this much in regard to the leading principles involved in the case, it remains to notice some of the authorities most relied on by the counsel of the appellee, in the course of their argument. The case of *Coles v. Bank of England*, 10 Ad. & El. 437, much pressed upon us, is no longer an unquestioned authority. From what was said of it in the case of *Evans v. Bank of Ireland*, 5 H. of L. Cas. 389, and in *Swan v. N. B. Australasian Co.*, 2 H. & Colt, 175, serious doubt has been thrown upon the case as an authority. But without discussing the question of the soundness of the decision, that was a case where it was alleged that certain acts done without authority at the time were subsequently ratified by the acts and conduct of the party in whose name the original acts were done. The validity of the acts in controversy were those alleged to have been ratified. That is not the question in this case; and consequently the case of *Coles v. Bank of England* has no application here.

The case of *De Feriet v. Bank of America*, 23 La. Ann. 310, also much relied on, is quite distinguishable from the present. There, when the first check was forged by the plaintiff's confidential clerk, and paid by the bank, the plaintiff was notified of the draft upon his account, and went at once to the bank, and upon being shown the check, while he stated that he had not signed the check himself, he refused to denounce it as a forgery. After seeing the clerk, the plaintiff reported back to the bank that the check was all right. The clerk made deposits to make the check good, and the plaintiff himself drew upon the deposits thus made. He continued the

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forger in his employ; and subsequently the same clerk forged another check, which the bank paid, and upon discovery of the second forgery the plaintiff denounced it. But it was held, that by his conduct in ratifying the act of the clerk in drawing the first forged check, the plaintiff was precluded from holding the bank liable for the payment of the second; that the bank was misled by the approval and ratification of the first forgery, and that it was therefore excusable for paying the second forged check drawn in all respects similar to the first. In that case, there was no question as to the want of knowledge on the part of the plaintiff of the first forgery committed by the clerk, and his full ratification and adoption of the act; nor was there any regard to the fact that the bank had been misled. In the present case, those are controverted questions, to be passed upon by the jury; but which were not submitted to be so found by the appellee's second prayer.

The appellants have also made an objection, by special exception, to the legal sufficiency of the evidence produced, assuming it to be true, to create an estoppel. But without going over all the circumstances of the case, we think the whole evidence ought to be submitted to the jury to be weighed by them. It is not for this court to say whether the evidence bearing upon the question of estoppel be weak or strong; we are only called upon to say whether there be any evidence legally sufficient to be submitted to the jury for their consideration; and in this case we think the evidence should go to the jury. It results from what has been said, that in the opinion of this court, there was error in granting the appellee's second prayer, but none in refusing the appellants' first prayer, in the form in which it was offered.

Having thus disposed of the main questions arising upon the prayers, it remains for us to determine the several questions presented in the exceptions as to the admissibility of evidence.

[Omitting these.]

Judgment reversed, and a new trial awarded.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

DUBOIS V. MASON.

(127 Mass. 37.)

Negotiable instruments — indorsement before utterance.

Where one indorses a note, payable to the order of the maker, before negotiation and before indorsement by the maker, his liability is that of indorser, and not of joint maker, if when the note is negotiated the maker's name stands first on the back.*

ACTION on a note made in Rhode Island, and there payable, by Shurtleff, to his own order, and indorsed by him, the defendant's name appearing under his as indorser. The defendant's indorsement was made after the signing but before the indorsement by Shurtleff, and before the negotiation. The action was against defendant as a joint and several promisor. The defendant had a verdict, subject to the opinion of the court.

H. J. Dubois, for plaintiff.

C. A. Reed, for defendant.

*See *Thacher v. Stevens* (46 Conn. 561), 33 Am. Rep. 39.

COLT, J. The note in suit was made in Rhode Island, and it is contended that by the law of that State the defendant is liable as a joint promisor with Shurtleff. Two decisions only of the Supreme Court of that State (*Matthewson v. Sprague*, 1 R. I. 8, and *Perkins v. Barstow*, 6 id. 505) were produced as evidence of the law there. Neither of these cases supports the plaintiff's claim; on the contrary, they state the law, so far as they go, in entire conformity with the law of this Commonwealth in like cases. It is well settled by the decisions of this court, that the defendant was not a joint promisor or maker. A promissory note payable to the order of the maker, and by him indorsed, is in legal effect a note payable to bearer. It may be transferred by indorsement, as well as by delivery. An indorser of such a note is entitled to demand and notice, and does not come within that limited class of cases where one who is neither maker nor payee, and who puts his name on the back of a note before it is negotiated, has been held as joint promisor. *Bigelow v. Colton*, 13 Gray, 309.

The liability of a party whose name appears on the back of a negotiable note is determined by the position of his signature with reference to other parties at the time when the note first takes effect by delivery. When a note is payable to the maker's own order, it can take effect only when indorsed and delivered by him. The fact that the defendant put his name on the back of the note before it was indorsed by Shurtleff does not make him a joint promisor, because he then knew that it must be indorsed by the maker before it could be negotiated, and the implication is that he intended to be liable only as indorser. *Clapp v. Rice*, 13 Gray, 403. See now also Stat. 1874, ch. 404.

In the absence of any evidence, the presumption is that the law applicable to this case is the same in Rhode Island as here. *Wood v. Corl*, 4 Metc. 203; *Cribbs v. Adams*, 13 Gray, 597. The ruling that the defendant was not liable as maker was therefore right.

Judgment on the verdict.

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WOODWARD V. TOWNE.

(127 Mass. 41.)

Bankruptcy — “fiduciary character” — attorney in fact.

An attorney in fact does not act in a “fiduciary character” within the meaning of the Federal Bankrupt Act. (*See note, p. 338.*)

CONTRACT. The plaintiff was the brother and only heir of Susan Slaney, of Boston; he employed the defendant, an attorney at law, to contest the validity of her will; the will was refused probate; the defendant was appointed administrator of the estate of Susan, collected the personal property, and accounted for the same; while the defendant was acting as counsel and as administrator, the plaintiff executed to him powers of attorney for the sale of real estate which belonged to the plaintiff in his own right and as the heir of Susan, and for other purposes, under which the defendant sold real estate and executed deeds, retained the proceeds, with the plaintiff's assent, for the pretended payment of debts, but lent the same to his father, then a man of means, but who failed to repay the same, and died insolvent; the defendant was subsequently adjudicated a bankrupt, and obtained his discharge. The plaintiff contended that the debt was not barred by the discharge. But the judge ruled that the discharge was a bar, and found for the defendant.

R. D. Smith, for plaintiff.

H. G. Parker, for defendant.

GRAY, C. J. The clause in the recent Bankrupt Act, exempting from the effect of a discharge in bankruptcy “debts created while acting in any fiduciary character,” is in substance and effect a reenactment of the clause in the Bankrupt Act of 1841, which allowed a like exemption to debts created “as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity;” and includes only technical trusts, and not trusts implied by law

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from contracts of agency or bailment. U. S. Stats. August 19, 1841, § 1; March 2, 1867, § 33; U. S. Rev. Stats., § 5117; *Chapman v. Forsyth*, 2 How. 202, 208; *Hayman v. Pond*, 7 Metc. 328; *Wolcott v. Hodge*, 15 Gray, 547; *Cronan v. Cotting*, 104 Mass. 245; s. c., 6 Am. Rep. 232; *Grover & Baker Sewing Machine Co. v. Clinton*, 5 Biss. 324; *Owsley v. Cobin*, 2 Hughes, 433; *Neal v. Clark*, 95 U. S. 704, 708; *In re Smith*, 18 Bank. Reg. 24; *Hennequin v. Clews*, 77 N. Y. 427; s. c., 33 Am. Rep. 641.

The money sued for in this case was not received by the defendant as administrator, not even as attorney at law, but as attorney in fact under the powers executed to him by the plaintiff.

Exceptions overruled.

NOTE BY THE REPORTER.—In *Green's Bank v. Chilton*, Mississippi Supreme Court, it was held, on the authority of *Chapman v. Forsyth*, *Grover & Baker Sewing Machine Co. v. Clinton*, *Cronan v. Cotting*, and *Neal v. Clarke*, *supra*, that the collection and appropriation by a bankrupt to his own use of a draft or note from a foreign correspondent does not fall within the exception as to fiduciary debts.

CONNECTICUT RIVER RAILROAD CO. V. COUNTY COMMISSIONERS.

(127 Mass. 50.)

Constitutional law — eminent domain — compensation.

A statute authorizing the taking of lands for the use of a railroad owned by the State, and of other railroads, without providing for compensation to the owners except from the earnings of the State railroad, is unconstitutional.

PETITION for a writ of prohibition. The opinion states the case.

N. A. Leonard, for petitioner.

C. Delano, for respondents.

GRAY, C. J. By the statute of 1878 (chapter 277), it is enacted that the manager of the Troy and Greenfield Railroad and Hoosac Tunnel (of which the Commonwealth, under previous statutes, had become the owner) shall, under the direction of the governor and council, construct a union passenger station in Greenfield, to be used for the Connecticut River Railroad Company, the Fitchburg

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Railroad Company, and other corporations using or operating the Vermont and Massachusetts railroad, and by all corporations using or operating the Troy and Greenfield railroad in Greenfield, and by the said manager and his employees for their purposes. This statute contains the following sections:

“SEC. 6. For the purposes of this act the said manager, under direction of the governor and council, may take all land necessary, from land of the Connecticut River Railroad Company or other parties, in manner provided by law for the taking of land for depot and station purposes by railroad corporations, so far as the same may apply; provided that for the purposes of this act no land of the Connecticut River Railroad Company lying easterly of Clayhill street, or the highway leading therefrom from Greenfield to Deerfield, or within four feet of the westerly rail of their main track, shall be taken without the consent of said company. The land taken under the provisions of this section shall be paid for from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel. All persons or corporations aggrieved by any award of damages for land so taken shall have a right to trial by jury thereon in manner provided by law in such cases.”

“SEC 8. For the purposes of this act, a sum not exceeding nine thousand dollars is hereby appropriated, to be paid from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel.”

The governor and council, acting under the provisions of this statute, directed said manager to enter upon and take a parcel of land of the Connecticut River Railroad Company, situated on the westerly side of Clayhill street in Greenfield, for such a station, and on December 9, 1878, the manager entered and took possession thereof accordingly, and presented a petition to the county commissioners of the county of Franklin, praying them to determine and award such damages to the Connecticut River Railroad Company, for the taking of its land, as might seem just. The Connecticut River Railroad Company, having been served with notice of that petition, appeared by counsel before the county commissioners, and objected to their assessing and determining such damages, or assuming any jurisdiction in the premises. But the county commissioners overruled the objection; and postponed further hearing on that petition to a future day.

The Connecticut River Railroad Company thereupon applied to a justice of this court for a writ of prohibition to the county com-

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missioners, upon the ground that this statute is unconstitutional, because no provision is made therein or otherwise for the reasonable compensation of the Connecticut River Railroad Company for the land so taken, and therefore the county commissioners have no jurisdiction to assess the damages. It is alleged in the answer of the county commissioners, and agreed in writing filed in the case to be the fact, that "the earnings of the Troy and Greenfield railroad, out of which said land damages are payable, will probably be amply sufficient to meet and extinguish all future, as they have all recent, claims for land damages."

Two questions are presented by the case, and have been argued by counsel: First. Whether the statute of 1878 (ch. 277) is unconstitutional for want of a sufficient provision for the payment of compensation for the land taken? Second. Whether the writ of prohibition is a suitable remedy?

The Constitution of the Commonwealth declares that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Declaration of Rights, art. 10. It has long been settled by the decisions of this court that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent. *Commonwealth v. Peters*, 2 Mass. 125; *Perry v. Wilson*, 7 id. 393; *Thacher v. Dartmouth Bridge*, 18 Pick. 501. "Under our Constitution," said Chief Justice SHAW, "the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make provision for a compensation, the act is simply void; no right of taking as against the owner is conferred; and he has the same rights and remedies against a party acting under such authority, as if it had not existed." *Boston & Lowell Railroad v. Salem & Lowell Railroad*, 2 Gray, 1, 37. So in a case of laying out as a public highway a bridge owned by a private corporation, Mr. Justice COLT said: "The duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the

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amount. Payment need not precede the seizure ; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay." *Haverhill Bridge v. County Commissioners*, 103 Mass. 120, 124.

In *Rodgers v. Bradshaw*, 20 Johns, 735, 744, cited by the learned counsel for the respondents, the decision was that the statutes applicable to the case, construed together, expressly provided for the estimate and payment of the damages, and that such payment need not be actually made before the entry upon the land ; and the *dictum* of Chancellor KENT, that an omission of the legislature to provide for compensation might not have made the entry a trespass, is opposed to the course of decisions in this Commonwealth, and has not been followed in New York. In *Bloodgood v. Mohawk & Hudson Railroad*, 18 Wend. 1, 17, Chancellor WALWORTH, while admitting that the legislature might authorize the land of an individual to be entered upon for the purpose of examination or of making preliminary surveys, without compensation, said : " But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund ; whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the State canal, such a remedy is provided ; and if the town, county or State officers refuse to do their duty in ascertaining, raising or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by mandamus to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid." And in *People v. Hayden*, 6 Hill, 359, 361, Chief Justice NELSON said : " Although it may not be necessary, within the constitutional provision, that the amount of compensation should be

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actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the State itself, that at least, certain and ample provision must be first made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay." See also *Rexford v. Knight*, 1 Kern. 308, 314; *Chapman v. Gates*, 54 N. Y. 132, 146.

Statutes taking private property for a public highway, and providing for the ascertaining of the damages, and for payment thereof out of the treasury of the county, town or city, have often been held to be constitutional. *Haverhill Bridge v. County Commissioners*, 103 Mass. 120; *Chapman v. Gates*, 54 N. Y. 132; *Lowerce v. Newark*, 9 Vroom, 151; *Yost's Report*, 17 Penn. St. 524; *Powers v. Bears*, 12 Wis. 213, 220; *Commissioners v. Bowie*, 34 Ala. 461. But in cases in which it has been so held, the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, and might be enforced by writ of execution or warrant of distress, or by mandamus to compel the levy of a general tax. *Hill v. Boston*, 122 Mass. 344, 350; s. c., 23 Am. Rep. 332; *Rose v. Taunton*, 119 Mass. 99, 101; *Bloodgood v. Mohawk & Hudson Railroad*, and *Rexford v. Knight*, above cited; *Commonwealth v. Commissioners of Allegheny*, 37 Penn. St. 237, 277; *Minhinnah v. Haines*, 5 Dutch. 388; *Brock v. Hishen*, 40 Wis. 674. The rule has not been extended to cases in which only a special fund was charged with the payment of the damages, and the municipality had no power to levy a general tax to pay them. *Chapman v. Gates*, 54 N. Y. 146; *Keene v. Bristol*, 26 Penn. St. 46.

In *Ash v. Cummings*, 50 N. H. 591, 621, it was said: "In cases where the State, or a county, or a town, is to be made liable for the damages which an individual may suffer by having his property taken for the public use, it is not so important that the compensation should be paid or secured in advance, provided the law provides a certain and expeditious way of ascertaining and recovering it, because there the presumption and the fact are that these municipalities are always responsible." And the saying was quoted with approval by a majority of the court in *Orr v. Quimby*, 54 N. H. 590, 594. But in each case it was *obiter dictum*. *Ash v. Cummings* was the case of a mill-dam erected by one individual to the injury of another. In *Orr v. Quimby*, it was admitted that the only question to be determined was whether the defendant had the right to

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enter and cut trees on the plaintiff's land, and that the question whether the land could be permanently occupied without assessment and payment of damages did not arise (54 N. H. 596); and the position assumed in the *dictum* above quoted was strongly controverted in an elaborate dissenting opinion of Mr. Justice DOE, as it had previously been in an able judgment of the Supreme Court of Maine, delivered by Chief Justice SHEPLEY. *Cushman v. Smith*, 34 Me. 247.

When private property is taken directly by the Commonwealth for the public use, it is not necessary or usual that the Commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient that the statute which authorizes the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the Commonwealth, and authorize the governor to draw his warrant therefor; because, as observed by Chief Justice BIGELOW, "This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the act." "It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and liquidated by due process of law." *Talbot v. Hudson*, 16 Gray, 417, 431.

But in the statute before us there is no pledge of the faith and credit of the Commonwealth, no appropriation of the general funds in its treasury, and no authority to the governor to draw his warrant for the payment of the damages out of such funds. On the contrary, the very terms of the statute preclude the inference of any such pledge, appropriation or authority, by directing that the land taken for the union passenger station shall be paid for from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel, and appropriating for the purposes of the act a sum not exceeding \$9,000 to be paid out of those earnings. Stat. 1878, ch. 277, §§ 6, 8. The fact, admitted by the parties, that those earnings will probably be sufficient to meet and extinguish all claims for damages for lands so taken, falls short of satisfying the requirement of the Constitution that the owner of property taken for the use of the public shall have a prompt and certain compensation, without being subject to any risk or unreasonable delay.

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The provisions of the Stat. of 1878, (ch. 277), specifying and appropriating a certain sum out of those earnings for the payment of damages assessed under this act, are equally conclusive against the suggestion made, though not strongly pressed, at the argument, that the Commonwealth, or the manager acting in its behalf, may be required by the county commissioners, at the request of the land-owner, to give additional security for the payment of the damages under the general railroad act of 1874, ch. 372, § 65. Sections 69 and 72 of that act, providing that if the railroad corporation shall not pay the amount of damages awarded by the jury, a warrant of distress or execution may issue to compel the payment thereof, and that until such warrant or execution is satisfied, all right and authority to enter upon the land, except for making surveys, shall be suspended, and the exercise thereof may be restrained by injunction, are also inapplicable, because in the present case no warrant of distress or execution can issue, either against the manager or against the Commonwealth; not against the manager, because he takes no title himself in the land, but is a mere agent of the Commonwealth, acting under the direction of the governor and council, and removable at their pleasure (Stat. 1875, ch. 77; 1876, ch. 150; 1878, ch. 191); not against the Commonwealth, because the Commonwealth is never liable to judicial suit or process, except so far as its own consent thereto has been clearly manifested by statute. *Troy & Greenfield R. R. v. Commonwealth*, 127 Mass. 43.

The Stat. of 1878 (ch. 277), therefore, so far as it purported to authorize the taking of land of the Connecticut River Railroad Company for a union railroad station, was unconstitutional, and the taking under that act was void, for want of any provision for adequate and certain compensation to the owner.

That taking, being unauthorized and void, did not alter the rights of the owner of the land, vested no title in the Commonwealth, and could not be the basis of a petition to the county commissioners for the assessment of damages as for land lawfully appropriated to the public use. The invalidity of the taking and the consequent want of jurisdiction in the county commissioners are not cured by the Stat. of 1879 (ch. 290), passed since this case was argued, and providing that the sums of money required under the Stat. of 1878 (ch. 277), shall be paid from the treasury of the Commonwealth, instead of from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel. The statement of Mr. Justice BALDWIN, in *Bona-*

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parte v. Camden & Amboy Railroad, Bald. 205, 226, that it is not indispensable that a law permanently appropriating private property to the use of the public should contain a provision for compensation, or prescribe the mode of making it, but that such a law would be valid if the legislature should by a subsequent law direct compensation to be made, appears to have been founded on the *dictum* of Chancellor KENT referred to in the early part of this opinion, and is inconsistent with the settled law of this Commonwealth, and with the weight of authority elsewhere.

We have no information of any new taking of the land since the passage of the Stat. of 1879, and the remaining question is whether, upon the facts appearing on the record, a writ of prohibition should issue.

[Omitting this discussion.]

Writ of prohibition to issue.

 FREEMAN'S NATIONAL BANK V. SAVERY.

(127 Mass. 75.)

Negotiable instruments—irregular indorsement—notice to purchaser.

L., a member of the firms of S. & Sons and P. & Co., made his own notes, payable to the order of P. & Co., and without authority indorsed them in the name of S. & Co. D., another member of the firm of P. & Co., then indorsed the name of that firm as first indorsers. They were presented to plaintiff for discount before maturity, one by a broker and the other by D., who was known to it to be a member of the firm of P. & Co., and discounted by the plaintiff. S. & Sons had no benefit from the notes. *Held*, in an action against S. & Sons, that the facts showed no conclusive notice of the invalidity of the indorsements.

ACTION on a promissory note. The opinion states the facts
The defendant had judgment below.

W. G. Russell and *H. M. Rogers*, for plaintiff.

E. Avery, for defendants.

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COLT, J. The defendants, partners doing business under the name of John Savery's Sons, are sued as second indorsers of a note made by Alexander Law, payable to the order of C. F. Parker & Co., and by them indorsed in blank. Law, at the time the note was made and negotiated, was a member of the firm of C. F. Parker & Co., and also of the firm of John Savery's Sons. It is agreed that the name of the defendants' firm was indorsed on the note by Law, without the knowledge or consent of the other partners, and in fraud of the rights of the firm. The name of the firm of C. F. Parker & Co. was indorsed by Charles H. Demeritt, a member of the firm, who, before its maturity, offered it to the plaintiff bank for discount. The note was at once discounted by the bank on the credit of the parties to it, and the avails paid to Demeritt. The bank had no knowledge or notice that the partnership name of the defendant's firm was indorsed on the note by Law without the authority and in fraud of the other members of the firm, other than what is to be inferred from the form of the note, or the facts above stated.

It is contended that the fact that the note was signed by Law, indorsed in the name of the defendant's firm by him, and then discounted for Demeritt, who was a member of the firm of C. F. Parker & Co., payees and prior indorsers, was conclusive notice to the bank that the defendants were accommodation indorsers and sureties; and that in the absence of proof that the signature of the firm name of Law was authorized, or ratified by the other members of the firm, all the defendants except Law are entitled to a verdict in their favor. This is the only question for our consideration.

It is settled that one who takes a negotiable promissory note for value, before maturity, in good faith, and without knowledge of any defect of title, may recover upon it, although facts are offered in evidence which impeach its validity between antecedent parties. A suspicion that there is a defect of title, or a knowledge of circumstances which might excite suspicion in the mind of a cautious person, or even gross negligence, not amounting to evidence of fraud or bad faith, will not defeat the title of the purchaser. *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. National Banks*, 21 id. 354, 359. The rule has been often approved by this court. *Spooner v. Holmes*, 102 Mass. 503; s. c., 3 Am. Rep. 491; *Smith v. Livingston*, 111 Mass. 346.

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When the defect or infirmity of title to the bill or note, however, appears on its face at the time of the transfer, it was said in *Goodman v. Simonds* that the question, whether a party who took it had notice or not, was a question of construction, and must be determined by the court as a matter of law ; as where a person who took a bill which upon its face appeared to be dishonored, was held not to have the rights of a *bona fide* holder (*Andrews v. Pond*, 13 Pet. 65) ; or where one taking a note so marked as to show for whose benefit it was to be discounted, was presumed to have knowledge of what the note imported. *Fowler v. Brantly*, 14 Pet. 318 ; *Brown v. Taber*, 5 Wend. 566. A party must be presumed to know the contents and true meaning of a written instrument which he takes is evidence of title, or of contract, and when it is in the form of negotiable commercial paper, to know the construction which must be given to it, with reference to the time when it is transferred to him, and the order of the several names then upon it. *National Bank of Commonwealth v. Law*, 127 Mass. 72. If the attempt is to impeach the title by facts accruing between other parties, independent and outside of the instrument itself, the question whether the purchaser had knowledge of them is a question of fact for the jury, to be proved by showing that they were directly communicated to him, or by proof of circumstances from which notice must be presumed.

Upon the face of the note in this case, there is nothing which indicates any irregularity or invalidity in the origin or negotiation of it. It represents a regular business transaction between Law, the maker, and C. F. Parker & Co. and between C. F. Parker & Co. and John Savery's Sons. The presumption is that it passed from one party to another for a good consideration, and that the firm names of the two partnerships were indorsed in the course of the regular business of the firms. The fact that Law was a member of both partnerships and wrote the name of John Savery's Sons as last indorsers, does not require us to infer that the paper was prepared by him in order to defraud his copartners. Because he was a member of each firm, he was not thereby deprived of the authority to sign the name of either or both, in the regular business of each ; nor were the firms thereby prevented from dealing with each other. The fact cannot of itself vary the rules which govern these transactions, and which are necessary for the free transfer of negotiable paper and for the protection of innocent parties, who take without notice, for value.

Thus in *Wait v. Thayer*, 118 Mass. 473, the individual note of the partner, indorsed with the name of the firm of which he was a member, was presented to the plaintiff by him for discount, and was then filled in with the date and rate of interest. It was held that these facts did not raise any conclusive presumption that the indorsement was an accommodation indorsement of the firm, or that the maker received the money for his own private use, and not as copartner; and that the court could not therefore properly rule that the form of the note, and the fact that it was in the maker's hands, were conclusive proof that it was indorsed for his accommodation.

In *Miller v. Consolidation Bank*, 48 Penn. St. 514, it was decided that one who is a member of several firms may draw and indorse the same paper as the representative of each, and it is no ground of suspicion that his indorsement of the name of one firm is in bad faith to another, or to the maker of the note. *Ihmsen v. Negley*, 25 Penn. St. 297; *Parker v. Burgess*, 5 R. I. 277; *Moorehead v. Gilmore*, 77 Penn. St. 118.

But the chief reliance of the defendants is on the proposition that because the note was discounted for Demerritt, a member of the firm of C. F. Parker & Co., the prior indorser, the firm of John Savery's Sons must be treated as an accommodation indorser. The possession of a note by the maker who offers it for discount is of itself, it is said, notice that the note, if ever before negotiated, has been paid by the maker, or that if not before negotiated, the indorsements are for his accommodation. And so if discounted for the payee, or the avails paid to him, it is evidence that subsequent indorsements were for his accommodation.

The difficulty with the defendants' position is, that there is nothing in the facts agreed which conclusively proves that the plaintiff discounted this note for the firm of C. F. Parker & Co., or knew that they were to have the avails of it. The fact that it was presented by a member of that firm, and that the avails of the discount were paid to him, must be taken in connection with the fact that the indorsements then on the note plainly indicated that the firm of which he was a member had parted with all interest in it to the defendant firm, and that he held it individually by blank indorsement from them. The inference is quite as natural that Demerritt was the owner of the note, and procured its discount for himself, because to construe it as a discount for the firm would be to impair

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the validity of the last indorsement, and defeat the legal presumption in its favor.

The court having ruled that the plaintiff was, as matter of law, affected with notice of the defense existing to the note on the part of the defendants other than Law, the entry is

New trial ordered.

MULLEN V. OLD COLONY RAILROAD CO.

(127 Mass. 86.)

Fraud — action — return of consideration.

If one fraudulently obtains from another his signature to a discharge of a cause of action against him, by misrepresenting the character of the paper, the latter may maintain the action without returning the money.

ACTION for personal injuries. The defendant answered, setting up a settlement of the case by the following paper, signed by the plaintiff by his mark: "Boston, August 10, 1877. Received of Old Colony Railroad four hundred and fifty dollars in full settlement and satisfaction for any and all claims that I have or may have against said company for injuries received at or near the entrance to their machine-shop yard, Foundry street, South Boston, by reason of the cars running off the track and striking the gate or fence, on or about May 14, 1877." The money mentioned was paid plaintiff at the time. The opinion states other facts. The defendant had judgment below.

R. D. Smith and J. A. Maxwell, for plaintiff.

J. H. Benton, Jr., for defendant.

SOULE, J. The report shows that there was some evidence tending to prove that the plaintiff was induced to sign the paper, relied on by the defendant as a contract of settlement of the plaintiff's claim, by false representations as to the purport of the paper, made by the agent of the defendant, and believed by the plaintiff to be true, he being unable to read. With the question of the weight and credibility of this evidence, and the further questions whether

the conflicting testimony outweighed it or was more worthy of credit, we have no concern now. The ruling at the trial was that even if it were true that the plaintiff was induced to sign the paper by the fraud of the defendant's agent as to its contents, he could not maintain his action without first returning the money which he received when the paper was signed.

It is well established that, if a party enters into a contract and in consideration of so doing receives money or merchandise, and afterward seeks to avoid the effect of such contract as having been fraudulently obtained, he must first give back to the other party the consideration received. *Coolidge v. Brigham*, 1 Metc. 547; *Estabrook v. Swett*, 116 Mass. 303. And if, after accepting a certain sum in settlement of an unliquidated claim for damages under a contract, one seeks to pursue his remedy for the damages on the ground that the settlement was procured by fraud, or is not binding upon him, he must first repay the amount received. *Brown v. Hartford Ins. Co.*, 117 Mass. 479. The principle on which these decisions rest is just; but it applies to those cases only where that which was received and which must be returned was the consideration of the contract or settlement which the receiver intended to make, and understood that he was making, and which he seeks to avoid by reason of fraudulent practices of the other party which led him to agree to its terms. It does not apply to cases where a party holds out that he gives the consideration for one thing and by fraud obtains an agreement that it was given for another thing.

In the case at bar, if the evidence for the plaintiff was true, he signed the paper which purports to show a settlement of his claim, believing it to be a totally different paper from what it in fact was. Signing in that belief, in consequence of the fraudulent representations of the defendant, he is not bound by it, because he never made the agreement which the paper indicates. He is not attempting to avoid a contract which he has made; but is showing that he did not make the contract which he apparently made. If this fact is established it establishes the further fact that he did not receive the money which was paid him when the paper was signed in consideration of the settlement of his claim; for the only ground on which the effect of the paper is destroyed is that it was not his intelligent act, but was fraudulently procured by the artifice of the defendant, who knew that he had not made the settlement and had not received a consideration for a settlement. The answer of the

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defendant, which sets up a release and discharge of the plaintiff's claim in consideration of \$450, is fully met by the plaintiff's evidence, if true; and the same evidence, which shows that the alleged release and discharge were never agreed upon, shows that the money paid was not paid under circumstances which entitle the defendant to have it returned. If it was paid for the support of the plaintiff till his case should be tried, or for a year, as a gratuity, it is clear that the defendant cannot insist on repayment. If it was paid with the representation that it was a gratuity, though with the intention on the part of the defendant's agent to get the plaintiff's signature to the paper relied on in defense, in consequence of such payment, the payment was a part of the fraudulent scheme, and the defendant cannot obtain any advantage from its own fraud.

We have not been referred by the defendant to any case in which it is held, that under circumstances like those of the case at bar, the plaintiff must repay money received by him before he can maintain his action. The case in our own reports in which the facts most nearly resemble those in this case is that of *Smith v. Holyoke*, 112 Mass. 517, but the question whether a return of the money was necessary became unimportant, because it was held that the offer to return it was seasonably made, if any return was necessary.

We are of opinion that the case should have been submitted to the jury, and that there must be a new trial.

New trial ordered.

BRADLEE V WARREN FIVE CENTS SAVINGS BANK.

(187 Mass. 107.)

Agency — indorsement by savings bank treasurer.

The treasurer of a savings bank cannot bind it by his indorsement in its name, by virtue of his office, although it had directed the sale of its notes, and authorized him to "draw all necessary papers and discharge all obligations."

ACTION against indorser, to recover interest on three notes of the Eastern Railroad Company of \$1,000 each, payable to the defendant and purporting to be indorsed in its name by A. H. Merrill, its treasurer.

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A by-law of the corporation provided that the treasurer "shall draw all necessary papers, and discharge all obligations of the corporation, and his signature shall be binding upon the corporation."

The defendant had voted to sell its Eastern Railroad notes. The defendant had judgment below.

C. A. Welch, for plaintiffs.

H. W. Paine & T. M. Simpson, for defendant.

Soule, J. The vote of the board of investment of the defendant corporation to sell the notes of the Eastern Railroad Company did not authorize the treasurer so to indorse them as to impose the liability of indorser on the defendant. Such indorsement was not necessary in order to enable the corporation to divest itself of property in the notes. They could have been indorsed without recourse, a well-known method of indorsing paper so as to avoid all liability on it. The treasurer went far beyond the authority given by the vote in assuming to make the defendant undertake that the notes should be paid at maturity, and failing that, should be paid by the defendant if duly notified of their dishonor. The power conferred by the vote is unlike that given by the comprehensive power of attorney in *Bronson v. Coffin*, 118 Mass. 156.

Authority to indorse is not to be inferred from the nature of the treasurer's office. The chief business of a savings bank is to receive deposits, invest them in certain classes of securities, specified in the statutes of the Commonwealth, and to pay to depositors the amount due them, either in whole or in part, as they from time to time demand. It has no authority to do a general banking business, not even to engage in the business of discounting bank paper. It is no part of the business for which it is established, to give a market value to, or obtain a market for, the negotiable paper of persons or other corporations, by guaranteeing or indorsing it. Its duty is to keep safely invested the moneys deposited with it, not to hazard those moneys by assuming responsibility for the performance of the contracts of others. It has been held that the treasurer of a savings bank has not authority, by virtue of his office, and without vote of the officers of the bank, to execute a release in the name of the bank. *Dedham Institution for Savings v. Slack*, 6 Cush. 408.

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Such authority is much nearer the powers inherent in the office than the authority to put the bank into the position of indorser of the notes of third parties. The provision in the by-laws that his signature shall be binding on the bank means his signature to necessary papers, and in discharge of obligations to the bank. This view of the law on this branch of the case renders it unnecessary to decide whether it is *ultra vires* for a savings bank to become indorser of the negotiable paper of others, and we express no opinion on that point.

[Omitting another question.]

Exceptions overruled.

TOWNE v. FISKE.

(127 Mass. 125.)

Fixtures — portable furnace — gas-fittings.

A portable hot air furnace and gas-fixtures in a house, although connected with the house in the usual manner, are not part of the realty. (*See note, p. 854.*)

ACTION for conversion of a hot-air furnace and pipes, and gas-fixtures, attached by the defendant, a deputy sheriff, and sold on execution, in favor of Claflin against Webster and wife. The articles in question had been put by them into a house pending a contract of purchase, which contract they had failed to perform, and were afterward sold by them to the plaintiff.

The furnace was an iron portable hot-air furnace set on the ground in the cellar, the cellar bottom afterward being concreted up to and around the furnace, the cold air box was put through, plastered into the wall of the cellar, and opened into the cold-air chamber in the base of the furnace by removing a panel, without being otherwise attached to the furnace; the furnace was connected with registers in the first and second stories of the house by hot-air pipes. The registers were set in soapstone collars fitted in holes in the floor made for them. The pipes were tin, and those connecting with the second story ran inside of the partitions or ceiling. The hot-air pipes were fitted to the furnace or register boxes, over collars like

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the joints of a funnel. The iron smoke pipe was ten or twelve feet long, fitted into a collar in the furnace and at the other end to the chimney. The furnace weighed from seven to eight hundred pounds, rested on the earth, by its own weight and was not otherwise fastened to it. The evidence was conflicting whether the concrete floor was so attached to the furnace that the furnace could be lifted out of it without breaking or disturbing the concrete; but there was evidence that when it was removed, the concrete was not disturbed.

The gas-fixtures were screwed to gas-pipes fixed in the house, and fastened, to prevent the escape of gas, with a preparation of boiled oil and red-lead put upon the screws before they were screwed to the pipes.

The plaintiff had judgment below.

W. F. Slocum & W. S. Slocum, for defendant.

A. E. Pillsbury, for plaintiff.

Soule, J. [Omitting other points and some *obiter* remarks.] The furnace was a portable furnace, there is no evidence that it had any peculiar adaptation to the house in which it was placed, or was essential to the enjoyment of the estate, or that it was intended otherwise than as furniture, in the same sense in which a stove is furniture. The court therefore properly refused to rule that it was a part of the realty. *McConnell v. Blood*, 123 Mass. 47.

Gas-fixtures, whether in the form of chandeliers suspended from the ceiling at the top of the room, or projecting as brackets from the perpendicular walls, though attached to the gas-pipes by screws, and made tight by cement, are in the nature of furniture, and do not lose their character as chattels by reason of the manner in which they are affixed. *Guthrie v. Jones*, 108 Mass. 191.

Exceptions overruled.

NOTE BY THE REPORTER.— On a similar state of facts the like decision was made in *Hegsham v. Dettre*, 89 Penn. St. 506, although it does not seem to have been necessary to the case. The court said: "There is no doubt but that the court below erred in excluding the defendant's offer to show, by parol evidence, that the plaintiff had agreed that the gas-fixtures and heater should go with the house. They were personal property, and so were the subjects of oral grant or reservation. The written agreement embraced realty exclusively, and there is nothing in it which precludes a collateral agreement concerning personal property. Growing crops pass by deed as appurtenant to land, and yet, as they are by custom personalty, a parol reservation of them is good. *Backenstoss v. Stadler's*

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Adm'ra, 9 Casey, 251; *Harpold v. Kuster*, 8 Wright, 392. If, then, growing crops may be thus dealt with, we see no reason for dealing otherwise with a portable heater and gas-fixtures."

In *M'Keage v. Hanover Fire Ins. Co.*, New York Court of Appeals, April 20, 1880, it was held that gas-pipes which run through the walls and under the floors of a house are permanent parts of the building; but fixtures attached to those pipes, where they are simply screwed on projections of the pipes from the walls, which can be detached by simply unscrewing them, are not. Neither are mirrors put up after a house is built, supported in their places by hooks and supports, some of which are fastened with screws to the wood-work and others driven into the walls, and capable of being detached without injury to the walls. Such articles are not appurtenances. *Winslow v. Merchants' Ins. Co.*, 4 Metc. 311; *Vaughn v. Haldeman*, 33 Penn. St. 523; *Rogers v. Crow*, 40 Mo. 91; *Montague v. Dent*, 10 Rich. (S. C.) Law, 135; *Shaw v. Lenke*, 1 Daly, 487; *Lawrence v. Kemp*, 1 Duer, 363; *Beck v. Re Bow*, 1 P. Wms. 94. And the mere declaration of the owner that he intends that such articles shall go with the house does not make them realty, nor does the purchase of them with the house as between a mortgagee, under a mortgage from the purchaser, and his lessee, even though the mortgagor, when negotiating for the lease, represents that they go with the house, no mention of that fact being made in the mortgage. And a purchaser from the mortgagor without notice of such articles would not be bound by the equities which might exist between the mortgagor and mortgagee, by reason of such representations. In *Smith v. Commonwealth*, 14 Bush, 31; s. c., Am. Rep. 402, it was held that gas chandeliers are the subject of larceny. See, also, cases cited in note, 29 Am. Rep. 403, to the same effect.

In *Sewell v. Angerstein* (18 L. T. N. S. 801), WILLES, J., said: "The gasaliers are part of the gas-pipes; and, to use a legal expression, they take their nature and are included in the fixtures which go with the house under the lease. They are as much a part of the gas-pipes as the millstones are part of the mill. Although the gasaliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gas-pipes, which are of no practical use when separated from them." On being asked to reserve the point, he said he entertained a very decided opinion on the matter; but to save expense in further proceeding, he would consult the judges in the other court. On his return he said: "I am confirmed in my view of the case, and think that the gasaliers ought to have been the subject of a separate agreement. As it is, they form part of the freehold, and were a part of the thing let, just as much as a pump-handle is a part of the pump; the handle may no doubt be removed without injury to the pump, but then the pump would be of no use without the handle." In *Keeler v. Keeler*, 31 N. J. Eq.; 4 Stew. 191, the same question arising, the court said: "The gas-burners are of the same character [fixtures] in this case. They are in no sense furniture; but are mere accessories to the mill."

CHURCHILL V. HOLT.

(127 Mass. 163.)

Action — indemnity for damages caused by negligence of tenant.

An occupant of a building who has been compelled to pay damages for injuries sustained by another by falling into a hatchway on the premises negligently left open and unguarded by a third person, may maintain an action against such third person for indemnity.

ACTION for indemnity for damages recovered against plaintiff.
The opinion states the case.

C. R. Train and J. O. Teele, for plaintiffs.

A. A. Ranney, for defendants.

MORTON, J. The plaintiffs were the lessees and occupants of a building on Winter street, a crowded thoroughfare in the city of Boston. Connected with the building there was a hatchway in the sidewalk leading into the basement. On March 31, 1875, one Julia Meston, a traveller upon the street, fell into the hatchway, which had been left open and unguarded, and was injured. She brought an action against these plaintiffs, alleging that she was injured by reason of their negligence in keeping the covering of the hatchway in an insecure condition, in allowing it to decay and become ruinous, and in allowing the hatchway to be uncovered, in which action she recovered a judgment for damages. The plaintiffs have brought this action to recover the amount of such judgment paid by them, on the ground that the hatchway was left uncovered, thus rendering the street dangerous, by the negligent and wrongful act of a servant of the defendants.

One ground taken by the defendants in this action is that the injury was caused by the joint negligence of the plaintiffs and defendants, that they were joint tortfeasors, and therefore that there is no right to indemnity or contribution between them. This subject was considered in the recent case of *Gray v. Boston Gas Light Co.*, 114 Mass. 149; s. c., 19 Am. Rep. 324; and the decision in that case covers the questions raised in the case at bar. As there stated, the rule that one of two joint tortfeasors cannot maintain an action against the other for indemnity or contribution does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability; in such case the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable. In the case at bar it was not negligent or wrongful for the plaintiffs to have a suitable hatchway extending into the sidewalk, or to open it at proper times, taking care to provide barriers or other warnings to prevent danger to travellers on the street. The negligence which made them liable to the person injured was that they allowed the hatchway to remain open without proper barriers or other warning. As lessees and occupants of the building, it was their duty, as between themselves and the public, to keep the

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hatchway in such proper and safe condition that travellers on the street would not be injured. If they neglected this duty they would be liable, although the unsafe condition was caused by a stranger, and although they did not know it. Their liability depended upon the question whether the hatchway was dangerous to travellers under such circumstances that the occupant of the building was responsible for the injury suffered, and not upon the question as to who negligently did the act which created the danger. If the defendants, or a servant in the prosecution of their business, negligently uncovered the hatchway and allowed it to remain unguarded, without the knowledge of the plaintiffs, whereby the plaintiffs from their relation to the building were made liable to the person injured, the rule as to joint tortfeasors does not apply, but the plaintiffs can maintain this action.

The ground taken by the defendants, that the judgment in the suit by Meston against the plaintiffs is conclusive against the right to maintain this action, cannot be sustained.

Under the pleadings in that suit the judgment may have been rendered upon the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover, or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *participes criminis* with the defendants, and is not inconsistent with their right to maintain this action.

At the trial the plaintiffs offered evidence tending to show that on the day when the accident happened they left the hatchway in a reasonably safe condition; that a servant of the defendants in the course of their business, without the knowledge of the plaintiffs, removed the cover, and left without replacing it or providing any barrier or warning; and that while it was thus open Mrs. Meston fell in and was injured.

We are of opinion that the evidence should have been submitted to the jury.

Case to stand for trial.

DONLAN V. PROVIDENT INSTITUTION FOR SAVINGS.

(127 Mass. 183.)

Negligence — wrong payment by savings bank of deposit.

The by-laws of a savings bank provided that depositors should sign and conform to the by-laws; in case of loss or theft of the deposit-book, should give immediate notice to the bank; and that the bank would not be responsible for payment to a wrong person in absence of such notice. A subscribed the by-laws by his mark, and was unable to read. Having died, his book was presented to the bank by one fraudulently personating him, and his deposit was paid by the bank. His executors had previously published the usual citation for proof of his will. The bank did not know of his inability to read, and had received no actual notice of the theft of the book nor of his death. *Held*, that the bank was not liable in an action by the executor for the deposit.

ACTION for bank deposit. The opinion states the case. The defendant had judgment below.

C. B. Southard, for plaintiff.

F. C. Welch, for defendant.

COLT, J. The Provident Institution for Savings paid the amount due on Ellen Donlan's bank-book to a person unknown, who, after the death of Ellen, presented the book for payment, and representing herself to be the person therein named, the defendant then believing her to be the original depositor. The plaintiff, as executor of her will, now demands payment of the same. In defense of the action, the bank relies upon certain of its by-laws, made to guard against fraud in withdrawing deposits which limit its responsibility for payments made under the circumstances here disclosed. These by-laws declare that "the institution will not be responsible for loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment," and that it "does not undertake to be answerable for the consequences of any mistake as to identity, if it pays to a wrong party upon the bank-book being presented." It is required that every depositor shall sign the by-laws and agree to conform to

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them, and in case of the loss or theft of the bank-book shall give immediate notice thereof to the bank. At the time the deposit in question was made, a bank-book evidencing the same was delivered to Ellen Donlan, in which the foregoing regulations and by-laws were printed. She also signified her assent and subscribed her name to the same by making her mark. She was unable to read, but that fact was unknown to the defendant. After death, and before payment by the bank, the executor published the usual probate citation, addressed to the heirs-at-law, next of kin, and all persons interested in her estate, to appear and show cause, if any, against the probate of her will; but the bank had no actual notice of her death.

The regulations adopted appear to be reasonable and proper, with reference to the peculiar business for which such corporations are chartered, and the bank had authority under the laws of this Commonwealth to make them. Gen. Stats., ch. 57, § 147. Stat. 1876, ch. 203, § 18. The jury found that the defendant was not guilty of negligence; and the instructions of the judge, that the plaintiff's testatrix was bound by the regulations, that her death was not a fact which the defendant was bound to know, and that the publication of the citation of the Probate Court was not notice to the defendants, as matter of law, were correct.

The by-laws which are intended thus to protect the bank must be taken to have been assented to and made part of the contract by Ellen Donlan when the deposits in question were made; they were subscribed by her with her mark; they were printed in the book which she accepted as evidence of the terms of contract; the book with its printed contents was her only voucher against the bank. The bank had a right to presume, in the absence of fraud or imposition, that it had been read by or to her, or that she was informed of its contents, and was willing to assent to its terms without reading or hearing it read; and her mere inability to write does not defeat this presumption. The contract thus made was intended to preserve the terms of the obligations assumed. And the defendant is not to be deprived of its protection by the willful or negligent omission of the depositor to know its contents. *Grace v. Adams*, 100 Mass. 505; s. c., 1 Am. Rep. 131. In *Rice v. Dwight Manuf. Co.*, 2 Cush. 80, a paper of printed regulations was shown to have been given to and accepted by the plaintiff, as containing the terms of a contract of employment, but which was not

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signed by either party. The plaintiff denied knowledge of its contents; but it was said, that where a party enters into a written contract, in the absence of fraud he is conclusively presumed to understand the terms and legal effect of it, and to consent to them. And in *Withington v. Warren*, 10 Metc. 431, which was an action on a note given in payment of an award, it was held that the defendant could not defend by showing that one of the arbitrators, upon the statement of the chairman that it was right, signed it without reading it, and that it was for a larger sum than was agreed on by the arbitrators, without showing that he was induced to sign by some fraud or misconduct. It would be peculiarly hazardous to the rights of savings banks if evidence of ignorance on the part of the depositor merely were permitted to control the presumptions which fairly arise from the transaction between them, and which the bank may well rely on. *Goldrick v. Bristol County Savings Bank*, 123 Mass. 320; *Levy v. Franklin Savings Bank*, 117 id. 448; *Wall v. Provident Institution for Savings*, 3 Allen, 96.

It is plain that the by-laws apply equally to the depositor and to his legal representatives. Their obvious purpose is to put upon the person who is entitled to the possession of the book the risk of keeping it safely. They declare in broad terms that "the institution does not undertake to be liable if it pays to the wrong party, upon the bank-book being presented," and the obligation to keep it safely after the death of the depositor rests upon those who have charge of the property belonging to the estate.

The citation of the Probate Court did not affect the defendant with notice, either actual or constructive, of Ellen Donlan's death. It was not directed to, nor seen by, the bank. It was in terms addressed to the heirs-at-law, next of kin, and all others interested in the estate. But the bank had no interest in the estate as a creditor, and no interest in or right to be heard on the question whether the will should be admitted to probate, or who should be appointed executor under it. It was a stranger to those proceedings. The fact that such a notice was published, and might have been seen by the defendant, bears upon the question of actual negligence on the part of the defendant in making the payment. But the jury have found that the defendant was guilty of no negligence, and therefore must have found that it paid without notice of the depositor's death. There is no rule by which the bank can be held conclusively bound to know of the death. It is settled

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in the law of agency, that the authority of the agent is determined by the death of his principal, at least as to all acts required to be done in his name, whether the fact of the death is known or not, and one reason sometimes given is that death is a public fact which all men are bound to know. *Marlett v. Jackman*, 3 Allen, 287, 294.

But the relation between the bank and the depositor is one of express contract, creating a limited liability, and not of agency. And there is no conclusive presumption that the defendant had knowledge of the death which can deprive it of the protection afforded by the terms of the contract, when payment is made to one who presents the bank-book.

Exceptions overruled.

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(127 Mass. 191.)

Seduction — evidence.

An action for seduction of a daughter may be maintained upon proof that in consequence she became nervous and excitable, and did not appear to be herself, without proof of pregnancy or sexual disease. (*See note, p. 866.*)

ACTION for seduction. The opinion states the point. The plaintiff had judgment below.

W. C. Loring, for defendant. 1. There was no evidence in support of the allegation in the declaration that the girl became sick and unable to render service to the plaintiff, her master. *Hewitt v. Prime*, 21 Wend. 79, relied upon in the *dictum* of COLT, J., in *Blanchard v. Ilsley*, 120 Mass. 487, has been overruled in New York. *Bartley v. Richtmyer*, 4 Comst. 38, 43; *Knight v. Wilcox*, 4 Kern. 413; *White v. Nellis*, 31 N. Y. 405; *Ingerson v. Miller*, 47 Barb. 47. It is also in direct conflict with *Eager v. Grimwood*, 1 Exch. 61; *Terry v. Hutchinson*, L. R., 3 Q. B. 599, 602; *Davies v. Williams*, 10 Q. B. 725; *Hall v. Hollander*, 4 B. & C. 660; *Thompson v. Ross*, 5 H. & N. 16; *Irwin v. Dearman*, 11 East, 23, 24; see, also, *Lee v. Hodges*, 13 Gratt. 726. In order to maintain an action for seduction, it is necessary to allege and prove that the plaintiff's property in

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the services of the party seduced has been impaired, and that the *damnum* was caused by the act of the defendant. *Grinnell v. Wells*, 7 M. & G. 1033; BRONSON, J., in *Bartley v. Richtmyer*, *ubi supra*.

2. To prove the allegation that he lost the services of his daughter, it was incumbent on the plaintiff to prove that her condition of health was such as to actually incapacitate her from performing as much menial service as her father could, considering her natural strength, reasonably demand from her. *Fores v. Wilson*, Peake, 55; *Taylor v. Neri*, 1 Esp. 386; *Burgess v. Carpenter*, 2 S. C. 7; *Eager v. Grimwood*, *ubi supra*. In Massachusetts a man can be punished criminally for seducing a woman (Gen. Stats., ch. 165, § 8); and there is therefore no reason why proof of the same loss of service should not be required in an action for loss of service caused by the seduction of a servant, as is required in an action for loss of service caused by any other battery of a servant. The evidence of loss of service in this case is very much weaker than that suggested in *Abrahams v. Kidney*, 104 Mass. 222; s. c., 6 Am. Rep. 220; or that shown in *Vanhorn v. Freeman*, 1 Halst. 322; *Briggs v. Evans*, 5 Ired. 16, or *Manvell v. Thomson*, 2 C. & P. 303.

R. M. Morse, Jr., for plaintiff.

COLT, J. At the trial, the defendant requested the court to rule that the evidence failed to show such loss of service, resulting from the alleged seduction, as would entitle the plaintiff to maintain this action.

The plaintiff must prove, first, that he was entitled to the service of his daughter at the time of the injury, and next, that the ability of his daughter to render service was impaired by the defendant's unlawful act.

There was evidence from several witnesses, including the plaintiff and the daughter, that the latter appeared strong and well before the alleged seduction, and that afterward she became nervous and excitable, and did not appear to be herself. Upon this part of the case, the jury were told that the plaintiff might recover, if they were satisfied that, as the immediate result of the criminal act, the health of the daughter failed, and there was a consequent loss of ability to render service; and it must have been found by the jury that the proximate effect of the seduction was an incapacity to work.

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In the opinion of a majority of the court, it cannot be declared, as matter of law, that this instruction was erroneous, or that the evidence did not justify the finding. The decline of the daughter's health and spirits directly followed the wrong charged. The daughter was herself a witness, and there was opportunity for the jury to judge of her physical strength and temperament, her natural delicacy and sensibility to the injury alleged. It cannot be laid down, as matter of law, that loss of health would not be the natural, probable and direct consequence of the defendant's act, although that act was followed by no sexual disease and no pregnancy. Shame, humiliation and mental distress, affecting the sensibilities of the victim and her capacity for faithful service, may well be a probable and natural consequence of the wrong, wholly without regard to the fear of abandonment or exposure.

The case is thus brought within the rule laid down in *Abrahams v. Kindey*, 104 Mass. 222; s. c., 6 Am. Rep. 220, where it was held by this court that it was sufficient to support the action, if the proximate effect of the criminal connection is an incapacity to perform service; as where the wrong committed, without producing pregnancy or sexual disease, causes bodily injury, or mental distress or disease, impairing health. It was declared that the same principle, which gives the master an action when the connection causes pregnancy or sexual disease, applies when the consequence of the act is loss of health resulting in the loss of service. To this extent, the law affords a remedy for the wrong done by the seducer. Loss of service is the technical foundation of the action, and there is no sound distinction between loss of service, as the result of physical disability produced by physical causes alone, and loss of service, the result of mental suffering and disturbance. In fact such is the mutual dependence of the mental and physical organization, such the direct and mysterious sympathy which exists when the healthy condition of either is disturbed, that it seems impracticable to attempt to distinguish between them. The damage to the parent and master in both cases is, at all events, the same.

In the administration of this remedy, courts have been governed by a liberal spirit, and damages not limited to loss of service have always been allowed to cover the real gravamen of the case, namely, the wounded feelings, the mortification and disgrace brought upon the plaintiff and his family by the act. The fiction of service is upheld, but it is applied by the courts so as to afford a substantial

and useful remedy for a wrong done. It would defeat the real purpose of the remedy to require in all cases proof of pregnancy or sexual disease. It is the duty of the defendant not to cause the servant to deprive the master of the service due; and that duty is equally violated whether the result is effected by improper artifice or by physical injury. The remedy, on principle, is equally clear whether the injury is produced by beating and wounding, by enticing away, or by seduction. In each case, the defendant's wrongful act has caused a direct injury to the plaintiff's lawful right; an injury which might fairly have been contemplated by the defendant.

In addition to the cases cited in *Abrahams v. Kidney*, we refer to *Boyle v. Brandon*, 13 M. & W. 738, and *Manvell v. Thomson*, 2 C. & P. 303. In the former case, there was no pregnancy and no disease, the illness of the daughter was caused by distress of mind produced by the defendant's abandonment, and for that reason was treated as too remote by POLLOCK, C. B.; but it is to be inferred from the remarks of the judges at the argument, that if the distress of mind had been the direct result of the seduction, it would have been thought sufficient to support the action. The case went off on another point. In the latter case, it was distinctly ruled by ABBOTT, C. J., that proof that the niece of the plaintiff, after her seduction and abandonment, was in a state of great agitation, received medical attendance, and was obliged to be watched lest she should do herself some harm, was sufficient to raise the presumption of that loss of service which was necessary to maintain the action. See, also, *White v. Nellis*, 31 N. Y. 405; *Briggs v. Evans*, 5 id. 16, 20; Cooley on Torts, 231.

As to the proof required to establish the relation of master and servant, the instruction given was that the plaintiff might recover if he had not parted with his right to claim his daughter's service, or proved any act of service, however slight; that whether or not the plaintiff had parted with his right to claim her services, or had abandoned her, was a question of fact on all the evidence; that merely permitting her to reside with another person, rendering services to him, would not amount to an abandonment. The judge also said, in this connection, that it was not necessary to show actual loss of service. But this could not have been understood as implying that it was not necessary to prove that the ability to render service, when required, was directly impaired by the defendant's act. The jury had just been told the contrary, in plain and

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distinct terms. They must have understood by the remark, that proof of acts of service was not necessary, if the right of the plaintiff to his daughter's service was established. When he has not parted with that right, it is sufficient to prove that she resides with him and is under age, or that if she resides and is employed elsewhere, he has not lost his right to her service. The technical foundation of the action, namely, the loss of ability to render service to the prejudice of the plaintiff's rights, is, to this extent, still maintained in the courts of this country, as in England. *Blanchard v. Ilsley*, 120 Mass. 487 ; s. c., 21 Am. Rep. 535 ; *Kennedy v. Shea*, 110 Mass. 147 ; s. c., 14 Am. Rep. 584 ; *Abrahams v. Kidney*, above cited ; *Bartley v. Richtmyer*, 4 Comst. 39, 47 ; *Hornketh v. Barr*, 8 S. & R. 36 ; 11 Am. Dec. 568 ; *Terry v. Hutchinson*, L. R., 3 Q. B. 599 ; *Blaymire v. Haley*, 6 M. & W. 55.

The language which the defendant here subjects to criticism must have been used in the sense above indicated, in *Hewitt v. Prime*, 21 Wend. 79. There the daughter, who was under age, was made pregnant before suit brought, while living at home. The judge refused to rule at the trial that the plaintiff must prove loss, expense or damage, before suit brought, and NELSON, C. J., declared that acts of service by the daughter were not necessary ; it was enough to support the action when the relation of service exists. The authority of that case does not appear to have been questioned in the New York courts. It is the act of seduction which gives the right of action to the parent and master, when that act is followed by pregnancy, sexual disease or loss of health. See *Davies v. Williams*, 10 Q. B. 725.

The defendant now further insists that the instructions given were calculated to mislead the jury, because they were not told that it was incumbent on the plaintiff to prove that the condition of the daughter's health was such as to actually incapacitate her from performing such menial labor as the plaintiff could reasonably demand. But without deciding whether any such qualification of the rule in reference to menial labor exists, it is sufficient to say that no such qualification was suggested or asked for at the trial ; on the contrary, the defendant's request on this subject had reference only to loss of service generally. He cannot now complain, that in answer to those requests, the judge did not take the distinction now suggested.

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For these reasons, a majority of the court is of opinion that the defendant has no ground of exception.

Exceptions overruled.

NOTE BY THE REPORTER.— LORD, J., dissenting, observed: "I content myself with saying, that after as full and careful an examination as I can make, and with the assistance of the researches of the learned counsel for the plaintiff, and more than all, of the learning of my associates, I have not discovered an action of this nature which has been sustained by a court of last resort. It is not contended, that by the defendant's act, there was either immediate physical injury done, or disease communicated, or the impregnation of the plaintiff's servant. The claim of the plaintiff is, that his servant's mental distress, occasioned by seduction by the defendant, is the cause of his loss. If this be so, the act of the defendant was the remote and not the proximate cause of the inability of the servant to labor, and I do not deem it necessary to discuss the question when the cause of action arises, whether at the time the act is committed by the defendant, or at the time when the attention of the victim is called to the enormity of her own misconduct, the remembrance of which deprives her of her capacity to work. If some subsequent personal reflection, some discourse from the pulpit or in the family, or perchance some public rumor, or even internal conviction of wrong, shall bring the subject to a condition of mind in which her capacity to labor is diminished, I do not deem it necessary to inquire whether the act of the defendant, which may well enough be deemed to be the *causa causans*, is itself the cause of action, or whether the condition of mind of the victim is the cause of the physical inability to perform service.

The action itself is anomalous. At first, the remedy of the father whose daughter was seduced was by an action of trespass *quare clausum fregit*, and a right of action having been established by the entry of the defendant into the plaintiff's close, the seduction of the plaintiff's daughter was admissible in evidence to enhance the damages of the trespass *quare clausum*. At subsequent periods, different modes of declaring, both in trespass and in case, were resorted to and were sustained by the courts. If anomalies be also allowed in the prosecution of the action, probably no serious harm will follow. There might be some difficulties, if a woman should repent after promiscuous sinning, and her repentance should disqualify her for labor or perhaps consign her to an insane asylum, in determining the relative responsibility of those with whom she had engaged in passionate indulgence; but the court happily can relieve itself from all difficulty by requiring that the relative proportion of the injury under the different circumstances shall be determined by the jury."

In *Knight v. Wilcox*, 14 N. Y. 413, there was no pregnancy, nor any illness or loss of service until three months after the seduction, when the daughter became ill in consequence of threatened exposure in a suit against defendant for the seduction. It was held that the action would not lie, for the reason that the loss of service was not the result of the seduction, but of the threatened exposure. WRIGHT, J., said: "The wrongful act must be the natural and direct cause of the injury for which damages are sought, and the damages recoverable its necessary and proximate consequence. When conception and pregnancy ensue from the illicit intercourse, attended by the usual effects upon the mental and physical health, there is no difficulty in tracing the injury for which the action is technically maintainable as a direct and immediate consequence of the seduction. But here there was no pregnancy, no illness of body or mind incident to the connection, nor did the alleged sexual intercourse affect either the mental or physical health of the daughter." Speaking of *Mauvell v. Thompson*, he said: "But there the mental illness which threatened the overthrow of the physical system was traceable directly to and immediately followed the wrongful act. It was in no way the act of strangers to the original wrong. The case if not of doubtful authority is not controlling." "It will not do that after the servant's guilt is exposed by others, and a sense of remorse and shame excited, and thereby she becomes ill and rendered temporarily unfit to do menial service, the master shall be held to sustain a loss or injury by an illness arising from such a cause on which to found an action of seduction."

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In *White v. Nellis*, 31 N. Y. 405, there was no pregnancy, but a venereal disease was communicated, making the daughter sick and unable to labor. The action was maintained. The court distinguished *Knight v. Wilcox* from *Maurell v. Thompson*. They say, by DAVIS, J.: "It by no means follows that there is no remedy where the loss of service is the direct effect of the wrongful act, although produced by some other consequence" than pregnancy. All that the law can require is *damnum et injuria*, for these constitute, when directly connected, the proper and complete elements of an action on the case. And wherever they combine as an immediate cause and effect the law cannot deny a remedy without a departure from principle."

In the same case, WRIGHT, J., who delivered the opinion in *Knight v. Wilcox*, observed: "I think it is not essential to the maintenance of the action that the illicit intercourse should be followed by pregnancy. The foundation of the action is the loss of service resulting to the father or master by the seduction of his servant; and when such loss of service has been actually sustained, as the direct effect of the seduction, it is enough. It certainly cannot be important to the right of action whether the father loses the services of his child by illness arising from pregnancy or from a vile disorder contracted by connection with her seducer."

COSTELLO V. CROWELL.

(127 Mass. 293.)

Negotiable instruments — negotiability — marginal memorandum.

A promissory note bearing in the margin the words, "given as collateral security with agreement," is not negotiable.*

ACTION on note bearing in the margin the words, "given as collateral security with agreement," indorsed in blank by payee, and held by a third person. The plaintiff had judgment below.

J. G. Abbott and E. F. Johnson, for defendant.

H. E. Swasey, for plaintiff.

LORD, J. Whether, by the general law merchant, the note in suit would be deemed a negotiable note is a question upon which the authorities are by no means uniform. See *Brill v. Crick*, 1 M. & W. 232; *Jury v. Barker*, E. B. & E. 459; *Williams v. Waring*, 10 B. & C. 2; *Haussoullier v. Hartsinck*, 7 T. R. 733; *Wise v. Charlton*, 4 A. & E. 786; *Fancourt v. Thorne*, 9 Q. B. 312; *Treat v. Cooper*, 22 Me. 203; *Arnold v. Rock River Valley Railroad*, 5 Duer,

* See *Polo Manufacturing Co. v. Parr* (8 Neb. 379), 30 Am. Rep. 830.

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207; *Sanders v. Bacon*, 8 Johns. 485; *Cummings v. Gassett*, 19 Vt. 308.

In this Commonwealth, however, it is settled by an uninterrupted series of decisions, that any language put upon any portion of the face or back of a promissory note, which has relation to the subject-matter of the note, by the maker of it before delivery, is a part of the contract; and that if by such language payment of the amount is not necessarily to be made at all events, and of the full sum in lawful money, and at a time certain to arrive, and subject to no contingency, the note is not negotiable. *Jones v. Fales*, 4 Mass. 245; *Springfield Bank v. Merrick*, 14 id. 322; *Heywood v. Perrin*, 10 Pick. 228; 20 Am. Dec. 518; *Makepeace v. Harvard College*, id. 298; *Wheelock v. Freeman*, 13 id. 165; *Barnard v. Cushing*, 4 Metc. 230; *Cota v. Buck*, 7 id. 588; *Osgood v. Pearsons*, 4 Gray, 455; *Palmer v. Ward*, 6 id. 340; *Hubbard v. Mosely*, 11 id. 170; *Haskell v. Lambert*, 16 id. 592; *Way v. Smith*, 111 Mass. 523; *Stults v. Silva*, 119 id. 137.

The words written upon the face of the note, given as collateral security with agreement," being incorporated in and made part of the contract, indicate with clearness that there may be a contingency, to wit, the performance of the undertaking to which this is collateral, in which it would not be payable; and so it lacks that element of negotiability which requires that at all events a sum certain shall be payable at a time certain. As this is decisive of the case, it is unnecessary to consider any other question.

Exceptions sustained.

NATIONAL MAHAIWE BANK V. PECK.

(127 Mass. 296.)

Bank — right to apply account of depositor on his debt to bank

A bank discounted for B. two notes, one executed by him in his official capacity as town treasurer, and indorsed by P., and the other his individual note. B. at the time kept a deposit account with the bank, but the proceeds of the official note were not put to that account. The official note was not paid at maturity. The individual note matured the next day after the official note, and exceeded the balance then on deposit to B.'s credit. The bank president

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thereupon directed the cashier to apply such balance on the individual note. Three days later P. tendered to the bank B.'s individual check, payable to and indorsed by himself in his official character, for such balance, and money sufficient therewith to pay the official note, and demanded the note. The bank refused to give it up, and brought suit on it against P. *Held*, maintainable, although the application of the balance on the individual note was not actually made until after P.'s demand.

ACTION on a promissory note for \$500, dated December 29, 1875, signed "Jos. A. Benjamin, Treas.," payable to the order of the defendant forty-five days after date at the plaintiff's bank, and indorsed by defendant.

Benjamin kept his individual banking account with the plaintiff. At the time of giving the note in suit he was treasurer of the town of Egremont, and the bank discounted this note for him for the payment of a tax due from the town. The note and the proceeds were not entered in his individual account. At the maturity of this note, February 15, 1876, the bank held a note, made by Benjamin individually, which it had discounted, dated November 13, 1875, for \$1,500, payable three months after date at the plaintiff's bank to and indorsed by Callender. On the 15th February there stood to the credit of Benjamin a balance in account of \$381.10, and the same so stood on the books of the bank until about six weeks before the trial, when it was indorsed, as of February 16, 1876, on the note for \$1,500.

On the last-named day, the maturity of the note for \$1,500, the president of the plaintiff bank, its principal financial manager, had directed the cashier if the balance to Benjamin's credit was not drawn out by his checks before the close of business hours to apply it on the \$1,500 note, and at the close of the bank for that day, no checks having been drawn on said balance, he had again directed the cashier to apply it on the \$1,500 note.

Three days later the defendant presented to the bank a check on the plaintiff bank, made and handed by Benjamin to defendant on that day for \$381, payable "to order of J. A. B. Treas. note 15th inst.," and at the same time tendered to the plaintiff's cashier \$120 in money and demanded the note in suit. The money had been furnished the defendant by Benjamin, but he did not inform the cashier of the bank of that fact. The cashier declined to receive the check and money, and told the defendant he could not accept the check, because he had been directed to apply the

balance of Benjamin's account on another claim held by the bank.

It was not the practice of the bank to charge over-due notes held by it to the account of a depositor until he had sufficient credits to pay the note. Benjamin became bankrupt in the spring of 1876, and died in July or August of that year. The defendant had judgment below.

J. Dewey, for plaintiff:

M. Wilcox, for defendant.

GRAY, C. J. Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. *Foley v. Hill*, 1 Phillips, 399, and 2 H. L. Cas. 28; *Bank of Republic v. Millard*, 10 Wall. 152; *Carr v. National Security Bank*, 107 Mass. 45; s. c., 9 Am. Rep. 6. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterward insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in *Baker v. Briggs*, 8 Pick. 122, 20 Am. Dec. 311; and *American Bank v. Baker*, 4 Metc. 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety. *Glazier v. Douglass*, 32 Conn. 393; *Field v. Holland*, 6 Cr. 8, 28; *Brewer v. Knapp*, 1 Pick. 332; *Upham v. Lefavour*, 11 Metc. 174; *Bank of Bengal v. Radakissen Mitter*, 4 Moore's P. C. 140, 162.

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The general rule accordingly is, that where moneys drawn out and moneys paid in, or other debts and credits, are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but where by express agreement, or by a course of dealing, between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker. *Clayton's case*, 1 Meriv. 572, 610; *Bodenham v. Purchas*, 2 B. & Ald. 39, 45; *Simpson v. Ingham*, 2 B. & C. 65; s. c., 3 D. & R. 249; *Pemberton v. Oakes*, 4 Russ. 154, 168; *Pease v. Hirst*, 10 B. & C. 122; s. c., 5 Man. & Ryl. 88; *Henniker v. Wigg*, Dav. & Meriv. 160, 171; s. c., 4 Q. B. 792, 795; *Strong v. Foster*, 17 C. B. 201; *Martin v. Mechanics' Bank*, 6 Har. & Johns. 235, 244; *Slate Bank v. Armstrong*, 4 Dev. 519; *Commercial Bank v. Hughes*, 17 Wend. 94; *Allen v. Culver*, 3 Den. 284, 291; *Newburgh Bank v. Smith*, 66 N. Y. 271; *Voss v. German American Bank*, 83 Ill. 599; s. c., 25 Am. Rep. 415. In the decision in *McDowell v. Bank of Wilmington and Brandywine*, 1 Harr. (Del.) 369, and in the *dicta* in *Dawson v. Real Estate Bank*, 5 Pike, 283, 298, cited for the defendant, this distinction was overlooked or disregarded.

In many of the cases, indeed, the money appears to have been deposited after the debt to the bank matured, so that the case was analogous to the ordinary one of a payment, which, not being appropriated by the debtor, might be appropriated by the creditor. But where the balance of account is in favor of the depositor when his debt to the bank becomes payable, it is a case of mutual debts and credits, which except in proceedings in bankruptcy or insolvency, neither the depositor nor his surety has the right to require to be set off against each other. Judge LOWELL, in allowing money on deposit to the credit of a bankrupt to be set off in bankruptcy against the aggregate debt due from him to the bank, said, "This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor." *In re North*, 2 Lowell, 487; see, also, *Demmon v. Boylston Bank*, 5 Cush. 194; *Strong v. Foster*, 17 C. B. 217.

In *Strong v. Foster*, a depositor gave to his bankers a promissory note with a surety, which was not entered in his general banking

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account; and it was held, that the surety, when sued by the bankers on the note, could not set up, either as payment or by the way of equitable defense, that shortly after the note matured the balance of account was in favor of the depositor to a greater amount, and the plaintiffs did not apply that balance in discharge of the note, or inform the defendant for three years afterward that the note remained unpaid. But the reasoning of the court applies quite as strongly when the balance in favor of the depositor exists at the time when his debt becomes payable, as when it is created by subsequent deposits. Chief Justice JERVIS said, "Here the note was never entered in the account at all; the rule as to adjusting balances therefore does not apply." "It would be essentially altering the position of parties, to establish, that because a banker, who holds a note of a third person for a customer, has a balance in his hands in the customer's favor at the maturity of the note, such third person is thereby discharged, if it turns out that the note was given by him as surety. There is no authority in equity for any such position, and none certainly in law." 17 C. B. 216, 217. And Mr. Justice WILLES observed, "As to what was said on the part of the defendant, that if a set-off arises between the creditor and the principal debtor, the liability of the surety on the note is extinguished; that doctrine would lead to singular results. These securities are often given to increase credits of bankers to their customers. If the liability of the maker were to depend upon the state of the customer's account at any one moment, he might never undergo the liability contemplated at all. The security is given without any reference to the other side of the account. This is the first time, I believe, that it has ever been suggested, that when a note given under circumstances like these falls due, and there is a balance in favor of the customer at the time, that balance must of necessity be applied to the discharge of the note." 17 C. B. 224. Even the usual inference from the entry of such a note in the account may be controlled by other circumstances. *City Discount Co. v. McLean*, L. R., 9 C. P. 692.

In the case at bar, it appears that the consideration received by Benjamin from the plaintiff bank for the note in suit was to be used by him in his official capacity as town treasurer; the note was regarded by the bank as an official or town matter, and neither the note nor its consideration was ever made part of his general banking account; and that when the check in favor of the defendant

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was drawn by Benjamin and presented at the bank, the bank held a personal note of Benjamin, overdue and exceeding in amount the balance of account in his favor at the time; the president of the bank had directed the cashier to apply this balance to the latter's note, and the cashier so informed the defendant when he presented the check. Under these circumstances, neither Benjamin, the maker, nor the defendant, the indorser, has the right to insist that this balance of account should be applied to the satisfaction of the note in suit, rather than of the other note of Benjamin; and according to the terms of the report, there must be judgment for the plaintiff.

Judgment accordingly.

HUCK V. GLOBE INSURANCE COMPANY; WALKER V. QUEEN INSURANCE COMPANY; STOWE V. GIRARD FIRE AND MARINE INSURANCE COMPANY.

(127 Mass. 806.)

Insurance — fire — fall of part of building.

A fire policy was conditioned to cease if the insured building should fall except as the result of fire. The building was equally and completely divided by a brick partition wall, with communicating doors in each story. A girder in one-half fell, bringing down substantially the whole of that part and the goods stored therein, but leaving the other part standing uninjured. A fire afterward broke out in the fallen part, destroying every thing in it save the outer walls, the partition wall, and an elevator, but not communicating to the other part. *Held*, that no action on the policy could be maintained. (*See note, p. 875.*)

THREE actions on fire policies. The opinion states the case.

M. P. Knowlton, for plaintiffs in the first and second cases.

G. Wells, for plaintiffs in the third case.

M. Wilcox & J. P. Buckland, for defendants.

GRAY, C. J. The manifest intent and purpose of the clause inserted in each of these policies, by which it is provided, that "if a

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building shall fall except as the result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine," is that the insurance, whether upon a building or upon its contents, shall continue only while the building remains standing as a building, and shall cease when the building has fallen and become a ruin. When substantially all the floors and the roof of a building used as a storhouse fall, leaving nothing standing but the outer walls and perhaps a staircase or an elevator, the building must be deemed to have fallen. When several buildings or the goods therein are insured by the same policy, the fall of one building terminates the policy, at least on that building or its contents.

The report shows that the eastern and western halves of the block were substantially distinct buildings, separated from each other by a brick partition wall extending from the front to the rear of the block and from cellar to roof (though with doors of communication in each story), and each of the two parts or buildings capable of standing or falling by itself; that in each of these two parts or buildings, midway between the partition wall and the end wall, there was a beam or girder in each floor, extending from the front to the rear, supported by four brick piers in the cellar and by wooden posts in each story, and upon which the joists of the floors rested; that by the giving way of the piers in the cellar of the easterly part or building, without the agency of fire, the beam or girder resting thereon fell down near the ground, bringing with it the floors and partitions and roof above, with the goods and merchandise in each story, in a mixed and confused mass, excepting only very small portions of some of the floors and of the roof, and a single case of goods; and that only the outer walls of this building (of which the brick partition wall separating it from the adjoining building was one), and an elevator five feet square in one corner, were uninjured by the fall; that it was after the fall that the fire broke out that caused the injury, for which recovery is sought in these actions, to the goods which had fallen, and to the elevator and to the surrounding walls, with the doors and windows therein, which remained standing; and that the west half of the building remained in all its parts undisturbed and uninjured.

Of the building forming the eastern half of the block, the roof and the whole interior, with all the floors and divisions thereof, had fallen, and nothing remained standing but the outer walls and the elevator, constituting a mere shell or ruin, and not a standing

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building in any proper sense. It follows that neither the goods precipitated by the fall into a confused mass, nor the walls of the ruined building, nor the elevator therein, were any longer at the risk of the insurers, and that in each of these cases a jury would not have been warranted in finding a verdict for the plaintiffs.

The decisions cited for the plaintiffs are not inconsistent with this conclusion. In *Fireman's Ins. Co. v. Congregation Rodeph Scholom*, 80 Ill. 558, the building, though shaken by a storm so as to lean over, remained entire, and no part of it had fallen. In *Breuner v. Liverpool & London & Globe Ins. Co.*, 51 Cal. 101; s. c., 21 Am. Rep. 703, goods exceeding in value the amount of the insurance were destroyed by fire in that part of the building which had not fallen, and the decision against the insurers was by a bare majority of the court.

The result is, that in each case there must, according to the terms of the report, be judgment for the defendant.

Judgment accordingly.

NOTE BY THE REPORTER.—In *Nave v. Home Mut. Ins. Co.*, 37 Mo. 430, "it was conceded that there was evidence in the case tending to show that the building, which was the subject insured, being used as a store and warehouse, and the floors being heavily loaded with merchandise, by reason of the overloading or of some defect of construction, before the happening of the fire, fell down and became a mass of rubbish, and that the fire, which occasioned the loss, afterward arose in the fallen materials." How long afterward does not appear. The case does not show that the policy contained any provision about the case of a fall of the building. It was held that the insurer was not liable. "The subject insured had ceased to be such, and became a mere congeries of materials before the fire occurred, and by reason of a cause not insured against in the policy." "The cause of the loss of the subject insured was not the fire, but the fall. That a fire sprang up afterward in the rubbish, and destroyed the fallen materials, was wholly another matter. The materials were not insured."

In *Lewis v. Springfield F. & M. Ins. Co.*, 10 Gray, 159, the insurance was on goods "contained in a granite store." One of the walls gave way, and half of the store and the whole of an adjoining building, separated by a party wall, fell, leaving the other half standing, supported by pillars. Before there was time to remove the goods, not displaced or injured by the fall, and within fifteen to forty minutes, fire broke out in the ruins of an adjoining store, and those goods were injured. For those goods the company was held liable. The court based this on the ground that the fall and the fire were parts of "one common and general disaster," "successive circumstances in the progress of a single calamity;" the "fire must be considered as having occurred substantially at the same time as the other incidents of the disaster. They were all blended together in one catastrophe, and constituted a single event." This case is distinguished on this ground by Mr. Wood (*Ins.* 239).

BLUMANTLE V. FITCHBURG RAILROAD CO.

(127 Mass. 322.)

Carrier — passenger's baggage — merchandise.

A railway passenger had merchandise checked without disclosing its character. There was no evidence of any agreement to carry it as freight, nor that the baggage-master had any authority to receive it as freight or as personal baggage. *Held*, that the company were not responsible for its loss, although the baggage-master knew the character of the baggage, and received similar packages from other passengers. (*See note, p. 379.*)

ACTION against a railroad company for the value of merchandise, not personal baggage, delivered by the plaintiff, a peddler, to the defendant, for transportation.

The plaintiff purchased a passenger ticket of the defendant in Boston for Maynard; delivered to the defendant's baggage-master two packages, exhibiting his ticket and receiving two checks for the packages. The plaintiff then took the train and arrived at Maynard the same forenoon. On his arrival, he surrendered one check to the station agent, received one package and went away. One or two days afterward, he presented the other check, and demanded the other package, but did not receive it, and was unable to obtain it.

The plaintiff offered evidence tending to show, that from the manner of tying up the bundle, some of its contents were visible; that it appeared to be a peddler's package; and that the baggage-master then said to him, "You will make lots of money, there are lots of peddlers." There was evidence that checks were used solely for personal baggage; that the defendant had promulgated a printed notice that no person in its service was authorized to take or send by passenger train any goods except personal baggage, and that any merchandise taken by such train was at the owner's risk. The plaintiff testified that he never knew or heard of such notice; and there was evidence tending to show that several peddlers, having bundles similar to that in question, went to Maynard on the same train with the plaintiff.

The judge instructed the jury, that if the plaintiff was ignorant of the rules and regulations of the defendant, in relation to baggage, and delivered the lost bundle to the defendant's baggage-master to be checked, as personally baggage was usually checked, and

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the baggage-master, knowing it was not personal baggage, received it and checked it as such, the defendant was liable for its loss, to the same extent as if it had been personal baggage ; that if the defendant did not deliver the bundle at Maynard, or if it delivered it there and suffered it to be taken away without the plaintiff's authority immediately upon its arrival there, so that the plaintiff lost it, he was entitled to recover its value; and that if the plaintiff knew the rules and regulations of the defendant, or if the baggage-master supposed the bundle to be personal baggage, the defendant was not liable for its loss.

The plaintiff had a verdict.

W. S. Stearns, for defendant.

J. E. Butler, for plaintiff.

GRAY, C. J. The ordinary contract made by a railroad corporation with a passenger, by the sale and purchase of a passenger ticket, is for the transportation of the passenger and of his reasonable personal baggage ; and the corporation is liable as a common carrier for such personal baggage only, and not for merchandise delivered by the passenger as baggage, without clear proof of an agreement to that effect. If merchandise, not disclosed, is included in the passenger's baggage, the corporation is not responsible for it as a common carrier. *Collins v. Boston & Maine Railroad*, 10 Cush. 506 ; *Stimson v. Connecticut River Railroad*, 98 Mass. 83 ; *Connolly v. Warren*, 106 Mass. 146 ; s. c., 8 Am. Rep. 300 ; *Macrow v. Great Western Railway*, L. R., 6 Q. B. 612. Such an agreement cannot be proved, or such a responsibility created, by mere evidence of a custom of passengers to take with them, and of railroad corporations to carry, similar packages as personal baggage ; or by evidence that the package, delivered by the passenger as baggage, is of such form or appearance as to raise a doubt or suspicion or inference that it contains merchandise. *Stimson v. Connecticut River Railroad*, above cited ; *Alling v. Boston & Albany Railroad*, 126 Mass. 121 ; s. c., 30 Am. Rep. 667 ; *Michigan Central Railroad v. Carrow*, 73 Ill. 348 ; s. c., 24 Am. Rep. 248 ; *Cahill v. London & Northwestern Railway*, 10 C. B. (N. S.) 154, and 13 id. 818 ; *Belfast & Ballymena Railway v. Keys*, 9 H. L. Cas. 556.

It has indeed been said by eminent English judges, that if the carrier accepts for transportation, as personal luggage of a passen-

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ger, articles that the carrier knows to be merchandise, he will be liable for their loss, though not arising from his negligence. PARKE, B., in *Great Northern Railway v. Shepherd*, 8 Exch. 30, 38; COCKBURN, C. J., in 13 C. B. (N. S.) 819, and in L. R., 6 Q. B. 619. But as the decision in each case was in favor of the carrier, the court had no occasion to consider what would be sufficient evidence of such acceptance.

In *Hannibal Railroad v. Swift*, 12 Wall. 262, the railroad corporation, at the requirement of a military commander, in time of war, furnished transportation for his troops, their baggage, camp equipments, arms and munitions, and the chattels of himself, as well as of an army surgeon, including a considerable amount of furniture; but no contract for the transportation was made until the arrival of the command at its destination, when the amount of compensation for the transportation of the whole was agreed upon. Such was the case of which the court, in an action brought by the surgeon to recover for the loss of his baggage and furniture, said: "Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practiced or attempted upon the employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise." "If property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage."

In *Sloman v. Great Western Railway*, 67 N. Y. 208, additional compensation was demanded and paid, and a special receipt given, at the time of accepting the goods, and no point was made at the trial that the baggage-master was not authorized to receive them as freight. In *Graffam v. Boston and Maine R. R.*, 67 Me. 234, the plaintiff's trunk was not delivered to the defendant corporation as personal baggage, nor for transportation on the same train with him, but to be carried on a subsequent day, and therefore as merchandise for which the corporation would be entitled to charge a reasonable compensation.

In the case at bar, the plaintiff offered and delivered the bundles as his personal baggage, and requested that they might be checked

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as such; and the baggage-master gave him checks for them accordingly, as he was bound to do for personal baggage of passengers by the statute of 1874, ch. 372, § 136. There was no evidence that either the plaintiff or the baggage-master agreed or intended that they should be carried as freight, or that the baggage-master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage. The case cannot be distinguished in principle from the previous decisions of this court already cited. Evidence tending to show that the baggage-master knew or supposed the bundles to contain merchandise, or that other passengers had similar bundles, would not warrant the jury in finding that the defendant agreed to transport the plaintiff's merchandise, or became liable therefor as a common carrier. The instructions under which the case was submitted to the jury were therefore erroneous, and the exceptions must be sustained.

Exceptions sustained.

NOTE BY THE REPORTER. — The attempt to distinguish *Sloman v. Railway*, 67 N. Y. 208, in this case is not entirely successful. The additional compensation was demanded and paid, and the receipt given for "extra baggage," and yet the railway company was held under the circumstances for the loss of the merchandise. The court said:

"The court at General Term placed its decision granting a new trial on the sole ground that there was no evidence to show that the baggage-master who received the trunks had notice of the fact that they contained anything other than the ordinary baggage of Marcus J. Sloman, the agent of the plaintiff. It does not appear that it was stated, in terms, to the baggage-master what the trunks contained, but the jury had the right to consider the surrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggage-master, and the dealing between them, and if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight.

"It appears that the passenger, Marcus J. Sloman, was a lad of eighteen, the son of the plaintiff, and employed by him, on a salary, as travelling agent to sell clothing by sample, and that the trunks in question contained the samples. He had with him, besides the two trunks, a valise which contained his personal baggage. The trunks, as described in the evidence, do not appear to have presented the appearance of ordinary travelling trunks. They were thirty inches long, twenty-seven deep and twenty-four wide. One was covered with oil-cloth and the other was of wood. Marcus testified that the baggage-master at Flint asked him where he wanted them checked to, and he replied that he did not know at that time, as he had sent a dispatch to a customer at Fentonville to know if he wanted any goods, and if he did not, he (Marcus) wanted to go to Rochester, as he expected to meet some customers on the train; that shortly before the train was due witness bought a ticket for Rochester, and went to the baggage-master and asked him to check the trunks to Rochester, which he did, and witness paid him two dollars. The trunks were not weighed, and it does not appear in the evidence for what the charge of two dollars was made. The baggage-master gave witness a written receipt for the two trunks, headed 'receipt ticket for extra baggage and dogs.' The baggage-master was called by the defendant as a witness. He gives a different statement of the conversation; says that Sloman paid him only one dollar; admits that the baggage was not weighed, but does not state what the dollar was paid for, nor whether he understood what the trunks contained, nor whether he

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received them as baggage or freight; neither was there any evidence as to any regulation of the company for charging extra compensation for the carriage of baggage of passengers.

"We think that upon this evidence the judge was justified in submitting the question of notice to the jury. If they believed the testimony of the young man, Marcus, the baggage-master had notice that he was travelling for the purpose of selling goods, and carrying these trunks for that purpose, as the place to which he wished them carried depended upon his meeting with customers. It was highly improbable that a lad of his age, and travelling on such business, would carry with him such large trunks for the transportation of his personal effects; and the fact that the baggage-master charged or received extra pay for their carriage is some evidence that they were not regarded as ordinary traveller's baggage, especially as the defendant did not offer any explanation of what the charge was for. From all the circumstances, the jury were, we think, authorized to draw the inference that the baggage-master understood that the agent was travelling for the purpose of selling goods, and that these trunks contained his wares; that he was not entitled to have them carried as his ordinary baggage, and therefore the extra charge was made, and they were carried as freight.

"The point is raised, on this appeal, that the evidence does not show that the baggage-master had authority to receive the trunks as freight. No such point was raised at the trial, nor was there any evidence that it was out of the usual course of business, or contrary to the regulations of the company, to transport freight on the passenger trains. The only evidence on that point is the testimony of the baggage-master that he had nothing to do with the freight department. The authority of the baggage-master seems to have been assumed, and he was, in the receipt given for the trunks, as well as in the motion for a nonsuit, designated as the agent of the defendant. The motion for a nonsuit was made upon the express ground that there was no evidence to submit to the jury upon the question whether the defendant's agent was notified that the baggage was other than ordinary baggage. His authority to receive it if it was not ordinary baggage was not questioned. The only point was, whether there was evidence of notice to him. It is too late now to raise the question of his authority. If it had been raised on the trial evidence might have been given on that subject."

On the last point the case is distinguished from the principal case.

Mr. Thompson says (Carriers of Passengers, 523): "If he is notified of the fact,"—of the goods not being personal baggage—"or if they are carried openly, or so packed that their nature is obvious, and the carrier accepts them for carriage without objection, the law presumes an undertaking on his part to carry them as baggage, and he will be liable for their loss as if they were properly baggage." Citing *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Hellman v. Holliday*, 1 Woolw. 365; *Minter v. Pacific R. Co.*, 41 Mo. 503. "But in order to make the company liable under such circumstances, the facts must be such as to leave no room for mistakes. The package must be such as to obviously indicate that its contents are not baggage. Thus, where a traveller carried with him a box covered with a black leather case, on the top of which was painted in the center, lengthwise, his name, in white letters about two inches long, and on each end of which was painted the word 'glass,' also in white letters about two inches long, and which had around it two black leather straps between the word 'glass,' it was held that the appearance of the box did not so plainly indicate that its contents were merchandise as to render the plaintiff liable for its loss. ERLE, C. J., said: 'It seems to me that it would be introducing a most pernicious rule to hold that if a package which from its appearance is likely to contain merchandise is brought to a railway by a passenger, the company's servants are bound to inquire if it consists of what is ordinarily understood to be personal baggage or merchandise, at the peril of being held liable for a loss if loss occurs.' *Cahill v. London, etc., Co.*, 10 C.B. (N. S.) 154; 13 Id. 818. So in a Canadian case. Here it appeared that the plaintiff delivered to the defendants' servant a box containing only rare plants and roses intended for sale, saying that he would pay for it, and the servant, after examining his ticket, said that there was nothing to pay, and that it might go with the plaintiff in the train. The plaintiff testified that the box was marked somewhere, 'plants perishable,' but he could not say that defendants' officers saw it, and it was sworn that if they had been notified that it was freight or merchandise, it would not have been taken. On these facts the court held that the defendants were not liable." *Lee v. Grand Trunk Ry. Co.*, 34 U. C. (Q. B.) 350.

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In *Stimeman v. Erie Ry. Co.*, cited by Mr. Thompson, the finding was that the railway company demanded and received ten dollars "as freight" for the carriage of the packages, and there was no finding that they were received and paid for as extra baggage, and there was no proof of misrepresentation or concealment. The company were held for the merchandise as well as the baggage. The remark that "if the carrier knew or had notice of the character of the goods taken as baggage, and still undertook to transport them, he is liable for their loss, although they are not travellers' baggage," must therefore be understood with reference to a case where they are paid for as freight.

In the *Minter* case, cited by Mr. Thompson, the merchandise consisted in a roll of carpet, for which the railway company was held responsible, it being apparent that it was not baggage.

See *Penn Co. v. Millar*, 35 Ohio St. 541, as to the liability of the carrier as warehouseman in the like case.

CROMARTY V. CITY OF BOSTON.

(127 Mass. 320.)

Municipal corporation — negligence — slippery sidewalk.

Where a foot-passenger, using due care, is injured by falling on a portion of a city sidewalk made of glass and iron, and worn smooth and slippery, solely in consequence of its slipperiness, he can maintain an action against the city therefor, as for a defect in a highway for which the city is liable by statute.

ACTION for personal injuries occasioned by a defect in a city street.

The plaintiff offered to prove that the "Hyatt patent cover," mentioned in the opinion, was composed of small lights of glass each set in an iron frame, and the whole frame of lights surrounded by an iron border about four inches wide, which border, as well as the iron inclosing each light, was originally, or when put down, thickly studded with projecting bolts or slugs, thus presenting a rough surface as a precaution for the safety of persons thereon travelling, to prevent slipping; and that the defendant, in obedience to a city ordinance, had long been in the practice of causing such covers to be re-perforated and studded anew with such bolts or slugs, as often as they became worn down smooth. The opinion states other facts. The case was reserved.

C. G. Thomas, for plaintiff.

H. W. Putman, for defendant.

Soule, J. This case presents the single question whether the evidence offered, if admitted, would have warranted the jury in finding that the sidewalk on which the plaintiff fell was out of repair or defective within the meaning of the Gen. Stats., ch. 44, § 22. In other words, can we say, as matter of law, that the plaintiff offered no evidence of a defect in the walk?

It is to be remembered that the question of due care on the part of the city of Boston is not involved. The liability of cities for defects in highways is created wholly by the statute, and if the defect has existed for twenty-four hours, does not depend in any degree on the carefulness or negligence of the city. The inquiry is purely as to the condition of the way; and if it was defective, it is immaterial whether the defect arose from causes within or without the control of the city; whether from sudden and violent action of the elements, or from gradual and imperceptible change and decay, or from the direct and intentional act of individuals. *Billings v. Worcester*, 102 Mass. 329; s. c., 3 Am. Rep. 460.

The plaintiff offered to show that a "Hyatt's patent cover," made in part of glass and partly of iron, formed a portion of the surface of the sidewalk, and had been so changed by wear as to be smooth and slippery, and that she stepped on it, and slipped, wholly by reason of its smoothness, and fell and was hurt. The defendant contends that, inasmuch as the general surface of the walk was level, and the "cover" was level with the rest of the walk, there was no evidence of a defect. This position cannot be maintained. It cannot be said, as matter of law, that smoothness and slipperiness of a sidewalk resulting from the condition of the surface of the material of which the walk is made, and not dependent on nor resulting from atmospheric influences, may not render the walk so unsafe and inconvenient for travellers thereon, as to be defective and out of repair within the meaning of the statute. If a walk is constructed of material so smooth and hard that travellers shod in the ordinary way are defeated or obstructed in their attempts to pass over it by inability to get the hold upon it with their feet which is necessary to their walking forward, or the want of which causes them to lose their balance and fall, such walk cannot be said, as matter of law, to be safe and convenient. And if in a sidewalk, the chief part of which is in proper condition for travel, a small part of the surface is constructed of material different from the remainder, and so smooth and slippery that a foot traveller, stepping

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suddenly upon it from the portion otherwise constructed, necessarily or probably slips and is likely to fall, it cannot be said, as matter of law, that such walk is not defective.

It is no answer to this doctrine, as applied to the case at bar, to say that the plaintiff makes no claim that the sidewalk and the cover were not constructed of proper materials. The allegation of the plaintiff is that the walk was defective. The inquiry is as to its condition, taking into consideration its location and the amount of travel to which it was subject. There is no concession that the materials were proper, and it is not necessary to consider that question. It is obvious, however, that materials, which under certain conditions would be proper for constructing the surface of sidewalks in some localities, would, under certain conditions, be improper for such use in other localities. Iron gratings, for example, which might be proper, laid with the bars at right angles to the line of the walk, on a level spot, and covering a small space immediately adjacent to the building standing next the street, could not, as matter of law, be held to constitute no defect, if laid with the bars running longitudinally with the walk, where it was constructed on a steep grade.

It is argued that the position of the defendant is sustained by the series of cases in which we have held that mere slipperiness, caused by smooth ice on a sidewalk, is not a defect which renders cities or towns liable for injuries sustained in consequence thereof. Those cases, however, are put upon the ground that it cannot be supposed to have been the intention of the legislature to cast on the towns a duty so impossible of performance as would be that of protecting the sidewalks from the slipperiness caused by moisture and frost in such a climate as ours. *Stanton v. Springfield*, 12 Allen, 566; *Luther v. Worcester*, 97 Mass. 268; *Billings v. Worcester*, *ubi supra*; *Fitzgerald v. Woburn*, 109 Mass. 204. These cases are carefully guarded in statement, and all contain the limitation that the walks must be properly constructed, and so as not to cause an unnatural accumulation of ice upon them. And cities and towns are not exempt from liability, if the snow and ice are permitted to lie upon the walk in ridges which become obstacles to travel, even though the traveller's fall be caused by slipping on the side of the ridge and not by stumbling against it. *Morse v. Boston*, 109 Mass. 446. The above-cited cases stand on the doctrine, not that the ice-covered sidewalks are safe and convenient for travel, but that their

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want of safety comes from a cause against which the legislature did not intend to provide that towns and cities should guard, and is not, therefore, a defect or want of repair within the meaning of the statute. The defective condition of a sidewalk caused by original faulty construction, or by wear of the material, by the action of natural causes such as storms, floods, hurricanes, in changing the surface of the walk, is manifestly within the statute, as has been repeatedly decided.

A majority of the court are of opinion that the evidence offered would have warranted a finding that the sidewalk on which the plaintiff fell was defective, excluding the proof of the city ordinance, which had no power to change the statute liability for defects in highways.

Case to stand for trial.

DOWS v. FANEUIL HALL INSURANCE COMPANY; SAME v. TRADERS AND MECHANICS' INSURANCE COMPANY; SAME v. MERCHANTS' INSURANCE COMPANY.

(127 Mass. 346.)

Insurance — fire — explosion — fall.

Three policies of fire insurance provided substantially that the company should not be liable in case of explosion unless fire ensued, and then only for the damage by such fire, one of the policies limiting the provision to the explosion of gunpowder or a steam-boiler; and one of them also provided that if a building should fall, except as the result of a fire, the insurance should immediately cease. By an explosion of inflammable gas in the building insured, the larger part of the walls on two sides was blown out, and the roof and partitions fell in, and the ruins of the building and its contents were immediately set on fire by coals from a stove therein. *Held*, that the company was liable on all the policies. (See note, p. 387.)

ACTION on fire insurance policies. The opinion states the facts. Verdict for plaintiff.

B. F. Butler and D. B. Gove, for plaintiff.

C. R. Train, for defendants in the first and third cases.

D. S. Richardson, for defendant in the second case.

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GRAY, C. J. These actions are brought upon three policies of insurance, each of which insures the plaintiff against loss or damage by fire "on his stock in trade as an apothecary, contained in brick building situate 525 Washington street corner of LaGrange street, Boston."

The evidence at the trial tended to show, that by a sudden combustion of inflammable gas, brought into contact with some burning substance, an explosion, accompanied by a flash of light and a loud report, took place in one of the upper stories of the building, which was of such force as to lift up the roof over the rear part of the building, to blow outward the larger portion of the walls on the two sides next the streets, and to cause the instantaneous fall of the whole roof, the interior partitions and the contents of the rooms, including a stove with a coal fire burning therein, in a mass of ruins upon the plaintiff's shop in the lower story; and that immediately after the explosion and fall, a fire, caused thereby, and kindled by the burning coals from the stove, broke out in the fallen ruins, and destroyed the plaintiff's stock to the amount insured by all the policies.

The explosion in the upper story having been caused by fire, the insurers, if no clause had been inserted restricting their liability for losses by explosion, would have been liable for the losses, whether by the explosion or by the subsequent fire, to the amount of the insurance. *Scripture v. Lowell Ins. Co.*, 10 Cush. 356. The verdicts charged the defendants only with the destruction of goods by the fire which broke out immediately after the destruction of the building and before there had been opportunity to remove the goods. The description of the goods in the policies as "contained in brick building" does not prevent the insurers from being held liable for this loss. This point was adjudged in *Lewis v. Springfield Ins. Co.*, 10 Gray, 159, which does not appear to have been brought to the notice of the court that decided *Nave v. Home Ins. Co.*, 37 Miss. 430, cited for the defendants.

The rights of the parties depend upon the legal effect of the special clauses inserted in the several policies.

By the policy of the Faneuil Hall Insurance Company, "in case steam power is used in or about the property insured, and the boiler shall burst, or any property insured is struck by lightning or damaged by explosion from any cause, this company is not liable unless fire ensues, and then for the loss or damage by fire only." If this

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clause had provided that the insurers should not be liable at all in case of explosion, they might not have been liable for a loss by the fire which the explosion brought into contact with the plaintiff's property. *St. John v. American Ins. Co.*, 11 N. Y. 516; *Insurance Co. v. Tweed*, 7 Wall. 44. But the exemption in case of explosion, not being unqualified, but being restricted by the exception "unless fire ensues, and then for the loss or damage by fire only," while it affirms the exemption of the company from liability for loss in consequence of an explosion, in producing which loss fire has no part, clearly affirms its liability for loss by fire ensuing upon an explosion, whether the fire is kindled by the explosion itself or by any other cause. *Briggs v. North American Ins. Co.*, 53 N. Y. 446.

Among the conditions upon which the policy of the Traders and Mechanics' Insurance Company is declared to be made and accepted is one that the company shall in no event be liable "for any damage caused by the explosion of gunpowder on storage, or a steam-boiler, except so far as the property after the explosion shall be destroyed by fire." The reasons already stated for the decision against the Faneuil Hall Insurance Company are applicable to this case also; and as the clause does not in any degree restrict the liability of the insurers for explosion by any other cause than gunpowder or a steam-boiler, they would be liable under the general rule affirmed in *Scripture's* case, above cited.

The case of the Merchants' Insurance Company presents a more doubtful question, which has been submitted by the parties on briefs to the consideration of all the judges. The policy, besides providing that this company shall not be liable "for any loss caused by the explosion of gunpowder or any explosive substance, nor by lightning or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning," contains this additional and distinct provision, which is not in either of the other policies: "If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine."

The question is, whether this last provision is applicable to the facts of the case, and in the opinion of a majority of the judges it is not. The provision, being introduced by the insurers and for their benefit, is, by a familiar rule, to be construed in case of am-

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biguity most strongly against them. It appears to us to have had in view the case of a building falling by reason of inherent defects, or by the withdrawal of the necessary support, as by digging away the underlying or adjacent soil. It might perhaps include the case of a building thrown down by a storm or flood or earthquake. But it would be construing this provision too liberally in favor of the insurers to hold it to include the case of the destruction of a building by an explosion within the building itself, and of a fire immediately ensuing upon and connected with such an explosion, the measure of the liability for which has been carefully and precisely defined in the previous provision of the policy.

The result is that in each case there must be judgment on the verdict for the plaintiff.

Judgment accordingly.

NOTE BY THE REPORTER.—See *Huck v. Ins. Co.*, *ante*, and note. In *Washburn v. Miami Valley, Union and Fidelity Ins. Cos.* United States Circuit Court, district of Ohio, May 24, 1880, 9 Ins. Law Jour. 761, the insurance was on a flour mill in which a fire was followed by an explosion of flour dust which destroyed the mill. The policy of the M. Company stipulated that it should not be liable for loss by explosion unless fire ensued and then for loss by fire only, and enumerated certain explosive articles whose keeping was prohibited. The policy of the F. Company, after prohibiting the keeping of certain explosives, provided that the company should not be liable "for any loss caused by the explosion of gunpowder, or any explosive substance, nor explosion of any kind, unless fire ensues, and then for the loss or damage by fire only." The policy of the U. Company provided that it should not be liable "for loss or damage occasioned by the explosion of a steam-boiler, gunpowder, or any other explosive substance, except only such loss as shall result from fire that may ensue therefrom; nor shall the company be liable for any loss by such fire, unless privilege shall have been given in the policy to keep such articles." *Held*, that there was nothing in the policies to withdraw their protection in case of fire, although an explosion was an incident of such fire. The companies were protected against fire resulting from an explosion, but not against an explosion as the result of a fire. *Held*, that the term explosives does not apply to explosives accidentally present of a known fixed character, and an element of the business, like flour-dust.

The court, SWAYNE, J., said: "Giving a literal view to the language of the second clause, which I have just read, the policy was void at the outset, and never had any validity, because there was in the mill from the first an explosive substance, to wit, flour-dust, and there was no permit given in the policy to keep such substance."

"Now I cannot suppose that that was the intention of this company. The policy must be construed, like all other instruments in writing, in the light of surrounding circumstances: and I am willing to construe this particular 'explosive substance' as not within the terms or meaning of the particular language, of the policies upon that subject."

"It will be observed that the companies are protected with respect to explosives by making it fatal to the policies to keep them; the policies become void if such explosives are kept. Perhaps right here I might remark that that word 'kept' must have a particular signification in this connection, and that it does not apply where explosives of a known fixed character—known to be such—were accidentally present in the structure insured, but it does apply where they were kept there, knowingly, in violation of the terms, which the policy contains with reference to them. That must have been the understanding or intention of the parties in reference to the peculiar substance, flour-dust, which is highly explosive, but which, as I have remarked, was necessarily present, and from which arose the genesis of the explosion, out of which this controversy has arisen."

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"Explosives are named only in connection with fires which they have produced. There is nothing said about them in connection with fires which have produced them. The policies on that subject are wholly silent. Is not this somewhat remarkable, if the construction contended for by the companies be correct? In that case, would not the language of the contract have naturally been that the company will not be liable for explosions and will not be liable for fires which produce them, or fires which they have produced? The first may define the liability of the company, and the sentence I have just read is certainly important. Would not the policies have read, 'That they will not be liable for explosions caused by fires, or for fires caused by explosion?'"

"But further, if it be suggested that this would leave the exception without any legal effect, I would say that there are several obvious answers. First, these clauses are frequently prepared by non-legal men, who do not know the legal effect of the language which they employ in such instruments, and I will add that these instruments go into the hands of individuals who know nothing of the legal effect of these special clauses which they contain. Again, if prepared by a legal hand, the writer may not have known, probably did not accurately know, the state of the law touching the subject to which the exception, and the exception within the exception, here in question, relate. Again, there is nothing which in terms — and this is substantially what I have said already — withdraws the exception here in question from the clause of insurance, as it would be if the construction contended for by the plaintiff's counsel be sustained. There is nothing disclosed which tends to withdraw the subject of these exceptions (nothing in terms, there may be by implication), of the clause here in question from the general language and operation of the clause employed; they refer to fires which the explosion shall produce, and are wholly silent as to the fires which produce such explosions.

"Again, insurance policies, like all other written contracts, are to be reasonably construed; yet, as with respect to all other written contracts, insurance policies are to be construed most strongly against the party making them, which in this case is the insurance company. I deem it proper to advert for a moment to the case in *Wallace**, which I did not fully understand at the argument. The exception was somewhat similar, and the fire happened in that case from an explosion, producing a fire at a distant point from the site of the insured property. A wind prevailed at the time, and swept the fire a considerable distance, and the property insured and covered by the policy was destroyed by fire. The company was sued, and it defended on the ground that the case was covered by the exception, which was that the company should not be liable for a fire produced by an explosion. That policy was at the opposite pole from the one here under consideration, and the assured was defeated. He recovered nothing. No doubt he thought that very unreasonable, as it seems to me most persons would regard it. He intended no doubt to have his property protected by that policy and supposed it was protected. The Supreme Court of the United States held from principle that it was not.

"It is very possible that the conditions of this clause (which were frequently brought to my attention, for I had a great deal to do with this head of the law practically), had produced a good deal of dissatisfaction, and hence this clause was changed. If that policy had been the same in this particular as those under discussion here, then, irrespective of the question of explosion, the party would have been entitled to recover, but the policy being different, the result was different. A change was made, probably having its origin in that case and others like it — a change was made to meet that difficulty, and hence it is, perhaps, we have these policies phrased as they are before us. Now, to recur again to the proposition to which I adverted at the outset, to wit, that there is nothing here which in terms withdraws the protection against fire, although that fire should involve an explosion. It seems to me that there would have been language to that effect if such had been the intention of the parties. The intention of the statute constitutes the law; the intention of the law-makers constitutes the law; the language may be within the letter of the statute and not within its meaning, and the language may be within its meaning, and not within its letter. That is a familiar proposition. If we can ascertain the intention and meaning of the parties here, that constitute the contract which it is the object of the court to carry out. According to the techni-

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cal formality of the law of insurance this explosion cannot be recognized. It was a part of that fire, just as much a part of the fire, and admitted to be such, covered by the insurance, as if there had not been an explosion, by the general language, 'insurance against fire.' If the exception had not been made, it would have been considered (which was conceded at the argument) a part of the fire, and the policy would have been held, for the purpose of this view of the case, just as effectual, as it regards the effects of the explosion produced by the fire, if the policy is now effectual with respect to fires produced by an explosion, upon which the language of the policy is express."

In *Briggs v. North American and Mercantile Insurance Company*, 53 N. Y. 446, referred to in the principal case, defendant had issued to plaintiffs a policy of fire insurance upon certain machinery used for rectifying spirits. The policy contained a clause excepting the company from liability for losses "caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only." Vapors from the works came in contact with the flame of a lamp, and an explosion ensued which nearly destroyed the building and machinery. A fire resulted, which occasioned some damage, but slight compared with that caused by the explosion. Held that defendant was not liable for the loss occasioned by the explosion. The court said:

"It is not denied that this was an explosion. If it was in fact an explosion, then the policy provides that the defendant shall not be liable for damages caused thereby. The plaintiffs insist, however, that an explosion caused by fire is a fire, and therefore the defendant is liable for the explosion, as for a fire. But that reasoning gives no force to the exception. It allows a recovery for the explosion, when the policy expressly stipulates that the defendant will not be liable for that. It may be conceded that in the absence of this exception a recovery could have been had for the whole damage, as for a loss by fire. The authorities referred to by the plaintiffs' counsel tend to that result. I do not think that position will aid the plaintiffs. An explosion, without this exception, if it come under the general head of fire, might have afforded ground for recovery, but the defendant guarded against that result by this express stipulation. The exception, too, is general, including explosions by fire as well as others.

"There seems no reason for excluding an explosion like this from the exception. There was no fire prior to this explosion. The burning lamp was not a fire within the policy. The machinery was not on fire, as such a term is ordinarily used, until after the explosion. The explosion here was the principal and the fire the incident. In such a case there can be no doubt that the defendant is not liable for the damage caused by the explosion. Where, however, the explosion is the incident and the fire the principal, a different question would be presented. Had the building been on fire, and in the course of the general conflagration there had been an explosion of a boiler, which injured some machinery that the fire was rapidly consuming, different views and considerations might well obtain."

DEMPSEY V. GARDNER.

(127 Mass. 381.)

Sale — delivery — mere delivery of bill of sale.

The mere delivery, for value, of a bill of sale of a chattel to the purchaser, does not vest title in him as against a subsequent attaching creditor of the vendor.

ACTION for conversion of a horse, attached by the defendant, a constable. The opinion states the point. The defendant had judgment below.

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J. P. Treadwell, for plaintiff.

C. Robinson, Jr., for defendant.

GRAY, C. J. If the testimony at the trial was believed, the title in the horse passed as between the parties to the sale. *Pratt v. Parkman*, 24 Pick. 42, 46; *Morse v. Sherman*, 106 Mass. 430; *Dugan v. Nichols*, 125 id. 43.

But by the law as established in this Commonwealth, it was necessary, as against subsequent purchasers or attaching creditors, that there should be a delivery of the property. No such delivery, actual or symbolical, was proved. The buyer did no act by way of taking possession or exercising ownership, and the seller did not agree to hold or keep the horse for him. The plaintiff's counsel, as he states in his bill of exceptions, in reply to a question from the judge presiding at the trial, expressly admitted that there was no evidence of delivery for the consideration of the jury, except such as might be implied from the execution and delivery of the bill of sale. That was not enough. *Carter v. Williard*, 19 Pick. 1; *Shumway v. Rutter*, 7 id. 56, 58; 19 Am. Dec. 340, and 8 id. 443, 447; *Packard v. Wood*, 4 Gray, 307; *Rourke v. Bullens*, 8 id. 549; *Veazie v. Somerby*, 5 Allen, 280, 289.

The cases cited for the plaintiff are quite distinguishable from this. In *Tuxworth v. Moore*, 9 Pick. 347; 20 Am. Dec. 479, and in *Bullard v. Wait*, 16 Gray, 55, the horse was in the possession of a third person, to whom notice of the sale was given. In *Chapman v. Searle*, 3 Pick. 38, and in *Ingalls v. Herrick*, 108 Mass. 351, there was an express agreement that the seller should hold the property on storage for the buyer. In *Thorndike v. Bath*, 114 Mass. 116; s. c., 19 Am. Rep. 318, the article was by express agreement left after the sale with the seller to be finished for the buyer. In *Dugan v. Nichols*, 125 Mass. 43, the question arose between the buyer and the assignee in bankruptcy of the seller, who had no greater rights than the seller himself; and the decision was put upon that ground.

The case of *Hardy v. Potter*, 10 Gray, 89, was an action of trover against a deputy-sheriff for attaching a quantity of lumber on mesne process against one Adams in January, 1856. At the trial the plaintiff testified that he bought the lumber from Adams in the State of Maine, in October, 1855, took bills of sale of it, and paid for it by his promissory notes; that the lumber was then lying upon

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certain wharves in Beverly in this Commonwealth, in the custody of one Cross, an agent of Adams and to whom Adams promised to write; that nothing more was to be done between the plaintiff and Adams in relation to the sale; and that in the fall of 1855 the plaintiff saw the lumber in Beverly. Upon that evidence the plaintiff rested his case. But the report, as published, is imperfect, as we find by referring to the original bill of exceptions, in not stating that Cross, being afterward called as a witness for the defendant, testified, among other things, "that he was informed in the latter part of October, 1855, by Adams, by letter, that he had sold all the lumber, but was not informed to whom the sale was made; that he learned for the first time in December, 1855, that the property had been sold to the plaintiff." This fact, though not particularly noticed in the very brief opinion upon the point of delivery, may well have had an important influence upon the decision; for where property sold is at the time in the custody of a third person, notice to him of the sale is sufficient to constitute a delivery as against subsequent attaching creditors. *Tuxworth v. Moore*, 9 Pick. 347; 20 Am. Dec. 479; *Carter v. Willard*, 19 id. 1; *Russell v. O'Brien*, 127 Mass. 349.

Exceptions overruled.

COMMONWEALTH V. HOLMES.

(127 Mass. 424.)

Criminal law — evidence — accomplice's testimony — corroboration.

Although a jury may convict on the uncorroborated testimony of an accomplice, yet, if evidence, introduced under objection for the purpose of corroboration, does not tend to connect the defendant with the crime, but it is left to the jury to say whether the principal evidence is corroborated, and they are instructed that if they are satisfied of the defendant's guilt upon the whole testimony, they should convict, this is error. (*See note, p. 408.*)

CONVICTION of arson. The opinion states the case in the fourth and fifth paragraphs from the end.

E. M. Wood and W. C. Spaulding, for defendant.

C. R. Train, attorney-general, for Commonwealth. The only question open on this bill of exceptions is, was the evidence, intro-

duced by the government in corroboration of the accomplice, legally corroborative?

Corroborative evidence is any evidence which properly induces the belief that the facts testified to by the accomplice are true. Joy on Accomplices, 68, 98; *King v. Jones*, 31 How. St. Tr. 251, 325; THOMPSON, B., in 31 How. St. Tr. 967, 980. Such evidence must corroborate some material portion of the accomplice's testimony. *Commonwealth v. Bosworth*, 22 Pick. 397. Material testimony is such testimony as may properly influence the result of the trial. 2 Bouv. Law Dict., Materiality; 1 Stark. Ev. (4th ed.) 822; *Melhuish v. Collier*, 15 Q. B. 878; *Commonwealth v. Merriam*, 14 Pick. 518.

The testimony of the accomplice was competent. *Commonwealth v. McCarthy*, 119 Mass. 354; *Commonwealth v. Choate*, 105 id. 451. If every part of the testimony of the accomplice was not in the first instance material to the issue, yet all of it having been admitted without objection, and denied by the defendant, each part of it became material; and as all the evidence introduced by the government for that purpose was corroborative of some part of that testimony, and in some degree tended to induce the belief that the whole story was true, it was legally corroborative and was properly admitted. *Melhuish v. Collier*, above cited; *Commonwealth v. Drake*, 124 Mass. 21; *Commonwealth v. Scott*, 123 id. 222, 238; *Higgins v. Andrews*, 121 id. 293; *Commonwealth v. Snow*, 111 id. 411; *Commonwealth v. Larrabee*, 99 id. 413. The portion of the testimony as to the whereabouts of the accomplice on the night of September 2 was material, for if it had afterward been proved that he had not left his father's house that night, his whole story would have been disbelieved, and it showed that he had the opportunity of seeing the attempt to burn the barn, which he testified that he did see. The accomplice was a minor, with no apparent means of procuring money; he testified that the defendant gave him four ten-dollar bills just after the fire; this testimony was material to the issue; and the fact that he was seen by several persons with four ten-dollar bills in his possession about the time he testified they were given to him by defendant had a tendency to corroborate his testimony. There was evidence tending to show a conspiracy on the part of the accomplice and the defendant, and the evidence of their standing and talking together was properly admitted as tending to show that they were on terms of intimacy. The testimony corrobo-

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rated was as material as in the following cases: *Commonwealth v. Elliot*, 110 Mass. 104, 107; *Commonwealth v. O'Brien*, 12 Allen, 183; *King v. Despard*, 28 Howell's State Trials, 345, 488; *People v. Dyle*, 21 N. Y. 578; *State v. Wolcott*, 21 Conn. 272.

GRAY, C. J. It has always been held that a jury might, if they saw fit, convict on the uncorroborated testimony of an accomplice. Lord HALE, Lord HOLT, and Lord MANSFIELD treated the question of his credibility as one wholly for the determination of the jury, without any precise rule as to the weight to be given to his testimony. 1 Hale's P. C. 304, 305; *Charnock's case*, 12 Howell's State Trials, 1377, 1454; *Rex v. Rudd*, Cowp. 331, 337; s. c., 1 Leach (4th ed.), 115, 120. The earliest case reported, we believe, in which there is any indication of such a rule, is one in which, on a trial at the Old Bailey in 1784, for robbery, the prosecutor was unable to identify the robbers, except one who turned king's evidence, and implicated the two prisoners. "But the court, though it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony, and the prisoners were acquitted." *Smith and Davis' case*, 1 Leach, 479, note.

In 1787,* at the trial of two men for highway robbery, the prosecutor testified that he was robbed by three men, stated the conversation between himself and them, and proved all the facts necessary in law to constitute the offense, but as it was dark, could not swear to the persons of the robbers. An accomplice then testified that he and the defendants, in the company of each other, committed the robbery, mentioning all the circumstances that passed, which exactly corresponded with those that the prosecutor had before related. Mr. Justice BULLER, before whom the trial was had, being in doubt (to use his own words) "whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction," referred the case to the consideration of the twelve judges; and afterward, in passing sentence, announced that the judges were unanimously of opinion "that an accomplice alone is a competent witness; and that if the jury, weighing the probability of his testimony, think

* 1788 in the text of 1 Leach, 484, but clearly shown to be a mistake by referring to 1 Leach, 478, 479, and 7 T. R. 609.

him worthy of belief, a conviction supported by such testimony alone is perfectly legal. The distinction between the competency and the credit of a witness has been long settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the judge; but if the ground of the objection go to his credit only, his testimony must be received and left with the jury, under such directions and observations from the court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision in the case. An accomplice therefore being a competent witness, and the jury in the present case having thought him worthy of credit, the verdict of guilty, which has been found, is strictly legal, though found on the testimony of an accomplice only." *King v. Atwood*, 1 Leach, 464. According to another statement of that case on page 479 of the same book, "the ten judges who were present were unanimously of opinion that the circumstance of his being an accomplice went to his credit only, and that his evidence might be left to the jury, although it was entirely uncorroborated by any other testimony; and that the practice of rejecting an unsupported accomplice is rather a matter of discretion with the court than a rule of law." And see s. c. cited in *Jordaine v. Lashbrooke*, 7 T. R. 601, 609. Shortly afterward a case of burglary was submitted to the jury on the uncorroborated testimony of an accomplice, and the conviction affirmed by the twelve judges. *King v. Durham*, 1 Leach, 478.

Lord ELLENBOROUGH, sitting at *nisi prius*, said: "No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only. Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed that he is a competent witness, and the consequence is inevitable that if credit is given to his evidence it requires no confirmation from another witness." *Rex v. Jones*, 2 Camp. 131. See, also, s. c. reported at length in 31 Howell's State Trials, 251, 315, 325, and *Despard's case*, 28 id. 345, 488, 489.

In *Rex v. Birkett*, Russ. & Ry. 251, in 1813, the twelve judges are said to have "thought that an accomplice did not require confirmation as to the person he charged, if he was confirmed as to the particulars of his story." The case came before them informally,

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and is very briefly and imperfectly reported, and perhaps presented the same point only as *Atwood's* case, above stated. Yet in some trials about the same time, or soon after, the jury were instructed that corroboration was not necessary upon every material fact, nor as to all the prisoners, and that it was sufficient if the accomplice was confirmed upon such and so many material facts as to satisfy the jury that his statement was true. THOMPSON, B., in *Swallow's* case, 31 Howell's State Trials, 971, 980, 981; LE BLANC, J., in *Mellor's* case, id. 997, 1012; BAYLEY, J., in *Rex v. Dawber*, 3 Stark. 34; HULLOCK, B., in *Rex v. Barnard*, 1 C. & P. 87.

But in 1829, where the testimony of an accomplice was confirmed as to an accessory, but not as to the principal, Mr. Justice LITTLEDALE directed an acquittal of both. *Rex v. Wells*, Mood. & Malk. 326. And for the past fifty years it has been the usual practice of English judges at *nisi prius* to advise the jury that the corroboration of the testimony of an accomplice ought to be of facts going to prove the guilt of the defendant, and that corroboration as to the guilt of one defendant only would not justify the conviction of another. VAUGHAN, B., in *Rex v. Field*, Dickinson Qu. Sess. (5th ed.) 520; PATTESON, J., in *Rex v. Addis*, 6 C. & P. 388; and in *Kelsey's* case, 2 Lewin, 45; WILLIAMS, J., in *Rex v. Webb*, 6 C. & P. 595; ALDERSON, B., in *Rex v. Moores*, 7 id. 270; in *Rex v. Wilkes*, id. 272; in *Rex v. Fletcher*, 2 Lewin, 45, note; and in *Regina v. Jenkins*, 1 Cox's C. C. 177; Lord ABINGER, C. B., in *Regina v. Farler*, 8 C. & P. 106; GURNEY, B., in *Regina v. Dyke*, id. 261; JERVIS, C. J., PARKE, B., and CRESSWELL, J., in *Regina v. Stubbs*, 7 Cox's C. C. 48; s. c., Dearsly, 555. This practice, however, was never considered as establishing an absolute rule of law. See PATTESON, J., in *Rex v. Hargrave*, 5 C. & P. 170; Lord DENMAN, PARK, J., and ALDERSON, B., in *Rex v. Hastings*, 7 C. & P. 152; GURNEY, B., in *Rex v. Jarvis*, 2 Mood. & Rob. 40; Lord ABINGER, in *Regina v. Farler*, *ubi supra*; MAULE, J., in *Regina v. Mullins*, 3 Cox's C. C. 526, 531.

In 1855 the question was directly brought before the Court of Criminal Appeal, held by Chief Justice JERVIS, Baron PARKE, and Justices WIGHTMAN, CRESSWELL and WILLES. By the case stated by the chairman of the Quarter Sessions it appeared that on the trial of Stubbs and two others for larceny three accomplices were examined, whose testimony was not corroborated as to Stubbs, but only as to the other prisoners, and that it was contended in behalf of

Stubbs that the jury should be directed that the evidence of the accomplices ought to have been corroborated as to him. But the chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner being connected with the crime charged; that their being corroborated as to material facts tending to show that the other prisoners were connected with the larceny was sufficient as to the whole case; that the jury should look with more suspicion as to the evidence in the case of Stubbs, where there was no corroboration, than in the cases of the other prisoners, where there was corroboration, but that it was a question for the jury. Chief Justice JERVIS and Baron PARKE said that the chairman had departed from the usual practice. The chief justice said: "Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may, no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner; but it is proper for the judge in such a case to advise the jury that it is safer to require confirmation of the testimony of the accomplice as to the third prisoner, and not to act upon his evidence alone, for nothing is so easy as for the accomplice, speaking truly as to all the other facts of the case, to put the third man in his own place." Baron PARKE said: "My practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. An accomplice necessarily knows all the facts of the case, and his story, when the question of identity is raised, does not receive any support from its consistency with those facts." And Mr. Justice CRESSWELL said: "I agree in the view of the question taken by my brother PARKE, and have always acted upon it. You may take it for granted that the accomplice was present when the offense was committed, and there may therefore be no difficulty in corroborating him as to the facts; but that has no tendency to show that any particular person who may be accused was there." But all the judges agreed that the rule that a jury should be advised not to convict on the unsupported testimony of an accomplice was merely a rule of practice, and not a rule of law, and that the Court of Criminal Appeal, having power to decide questions of law only, could not interfere. *Regina v. Stubbs*, Dearsly, 555; s. c., 7 Cox's C. C. 48.

In Taylor on Evidence (3d ed.), 796, the general rule is thus

stated: "The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said they ought not to believe him unless his evidence is corroborated by other evidence; and without doubt, great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists upon the subject; and the jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that judges in their discretion will advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration, and the practice of giving such advice is now so general, that its omission would be deemed a neglect of duty on the part of the judge. Considering too the respect which is always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the case from the jury by positive directions to acquit, but only advise them not to give credit to the testimony." It may be observed that this statement is borrowed, almost word for word, from Professor Greenleaf's treatise published many years before. 1 Greenl. Ev., § 380.

In *Regina v. Boyes*, 9 Cox's C. C. 32; s. c., 1 B. & S. 311; 7 Jur. (N. S.) 1158, which came before the Court of Queen's Bench on a motion for a new trial, Chief Justice COCKBURN quoted this passage from Taylor on Evidence with approval, and said of the judge's instructions to the jury: "If he told them the practice was generally not to act on the evidence of an accomplice without being confirmed, but if the evidence made out of their minds that he was speaking the truth they ought to believe him, I think his direction was right. I protest against its being the duty of the judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated." 9 Cox's C. C. 35, 36. And Justices WIGHTMAN, CROMPTON, HILL and BLACKBURN were of opinion that the application of the rule was a matter of discretion with the judge before whom the trial was had, depending upon the circumstances of the case, the nature of the crime, and the extent of the complicity of the witnesses (1 B. & S. 320-322; 7 Jur. [N. S.] 1161, 1162); in this respect substantially concurring with the opinions of the

twelve judges of England in the case of Atwood, already cited, and of all the Irish judges in *Rex v. Sheehan*, Jebb, 54.

The leading case in this court upon the subject is *Commonwealth v. Bosworth*, 22 Pick. 397, decided in 1839, in which, on the trial in the Court of Common Pleas of an indictment for larceny, an accomplice in the commission of the crime testified in behalf of the Commonwealth, and the defendant, being convicted, brought the case to this court upon two exceptions to the admission of evidence, which were as follows:

First. The accomplice, being asked by the defendant's counsel, upon cross-examination, whether he had not been promised indemnity from prosecution and a reward in money if he would become a witness for the Commonwealth, gave an account of several interviews between himself and a deputy-sheriff and the magistrate before whom the preliminary examination was had, and testified that the officer and the magistrate had given him assurances that he would not be prosecuted if he would tell all he knew in regard to the transaction, and should be paid the sum of \$100 if he would tell where certain stolen cloth was, provided that was all he knew about the matter. The district attorney, as the bill of exceptions stated, "claiming a right to corroborate the testimony of this witness as to all matters about which he had been properly examined, in order to support his general credit," called the officer and the magistrate as witnesses, who "testified to the same assurances and to the circumstances and conversations which took place at the several interviews between them respectively and the accomplice. To this testimony the defendant objected; but the court overruled the objection, and admitted the evidence."

Secondly. "The defendant, for the purpose of impeaching the testimony of the accomplice, introduced in evidence a letter from him to the defendant, in which he admitted that his testimony in relation to this case, on a former occasion, was false. To explain this evidence, and to show that the letter had been obtained unfairly, the district attorney asked the witness a variety of questions, in answer to which he stated, among other things, that this letter was a part of a correspondence which had been carried on in prison, after he and the defendant had been confined there. He also stated the means by which the correspondence had been carried on, the situation and the relative position of the several rooms, and the arrangement of the prisoners therein at different times while the

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correspondence was carried on. The district attorney, in order to corroborate the testimony of the accomplice, for the purpose of supporting his general credit, then called the sheriff and jailer to prove that the situation of the rooms and arrangement of the prisoners therein corresponded with the account given by the accomplice. To the admission of this evidence the defendant objected ; but the court overruled the objection, and the evidence was admitted."

Mr. Justice MORTON, who delivered the opinion of the court, began by affirming, and supporting with references to authorities, these two propositions :

"1. It is competent for a jury to convict on the testimony of an accomplice alone. The principle which allows the evidence to go to the jury necessarily involves in it a power to believe it. The defendant has a right to have the jury decide upon the evidence which may be offered against him ; and their duty will require of them to return a verdict of guilty or not guilty according to the conviction which that evidence shall produce in their minds."

"2. But the source of this evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the court ever consider it their duty to advise a jury to acquit, where there is no evidence other than the uncorroborated testimony of an accomplice."

He then proceeded to discuss and define the nature and extent of such corroboration, thus : "3. The mode of corroboration seems to be less certain. It is perfectly clear that it need not extend to the whole testimony ; but it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. But what amounts to corroboration ? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue." The meaning of this is made clear by what immediately follows : "To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters, which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness, not incompetent for want of understanding, could always furnish materials for the corroboration of his own testimony. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail or what room in the jail he had been confined, he might easily get confirmation of all these particulars. But these circum-

stances having no necessary connection with the guilt of the defendant, the proof of the correctness of the statement in relation to them would not conduce to prove that a statement of the guilt of the defendant was true."

Taking the whole paragraph together, it is manifest that the phrase "material to the issue" is used as equivalent to "involving the guilt of the party on trial," or "having necessary connection with the guilt of the defendant." This interpretation receives support from the reference, at the end of the paragraph, to the case of *Rex v. Addis*, 6 C. & P. 388, in which Mr. Justice PATTERSON said, "The corroboration of an accomplice ought to be to some fact or facts, the truth or falsehood of which go to prove or disprove the offense charged against the prisoner."

Having thus stated his general propositions, Mr. Justice MORTON added: "4. But these principles, though plain, are not always easy of application. Questions of competency are so numerous and various, are distinguishable from each other by such nice shades of difference, and many of them come so near the line, that it oftentimes is extremely difficult to determine whether they fall on the one side or the other."

He then announced the decision of the court upon the particular questions before it, in the following terms: "The inquiries of the accomplice by the defendant's counsel, whether he had been offered a reward or promised an indemnity, were relevant questions, and the answers to them became material evidence. We are therefore inclined to think that the testimony in confirmation of these answers was admissible. But this can scarcely be brought within the line; and we are of opinion that the testimony of the sheriff and jailer, as to the location of the rooms in the jail and the situation of the prisoners, etc., falls on the other side of the line. We cannot perceive how the circumstance that the witness told the truth about these public and common objects, concerning which he knew that proof was at hand, has any tendency to confirm the material parts of his testimony, involving the guilt of the defendant. We think the Court of Common Pleas erred in the admission of this evidence. And although there is very little reason to suppose that it had any influence upon the minds of the jury, yet as it cannot be known that it had none, and as this is a criminal case, we feel bound to order a new trial."

The evidence which the court was "inclined to think admissi-

ble," though it could "scarcely be brought within the line," was the testimony in confirmation of the answers of the accomplice to the inquiries made of him on cross-examination, whether he had been offered a reward or been promised an indemnity. This evidence was doubtless "admissible" to affirm or prop up the credit of the accomplice, as of any other witness whose credit had been attempted to be impeached. *Commonwealth v. Ingraham*, 7 Gray, 46. But as to its being "scarcely within the line" of which the judge was speaking, namely, the line that divides evidence which is sufficient from that which is insufficient to establish such corroboration of an accomplice as will make it safe for a jury to convict, it is difficult to see how it could be brought within that line at all; for how could the evidence of the circumstances as to the promise of reward and of indemnity tend to render the accomplice more worthy of belief, than if no such inquiry had been put to him on cross-examination? But if it did come within the line in question, it was not because it tended to confirm him as to a fact which did not tend to connect the defendant with the crime, but because it related to the degree of bias under which the accomplice testified, which would affect the credit of his whole testimony, and no less that part which directly bore upon the defendant's guilt than the other parts.

To construe the hesitating expression of opinion in favor of the admissibility of the evidence concerning the offer of reward and promise of indemnity, as warranting the admission, for the purpose of establishing the corroboration of an accomplice, of testimony to facts not connecting the defendant with the crime, would not only be wholly inconsistent with the test previously stated under the third head of the opinion, but would be in direct conflict with the judgment sustaining the other exception and granting a new trial for the very reason that the court could not perceive that the evidence admitted as to the location of the rooms at the jail and the situation of the prisoners had "any tendency to confirm the material parts of his testimony, involving the guilt of the defendant."

It thus appears that the decision in *Commonwealth v. Bosworth* establishes two points: 1st. That if any evidence is admitted as competent by way of corroborating an accomplice so as to make it safe for the jury to convict, which is not legally entitled to that effect, it is a subject of exception and ground for a new trial; 2d. That no evidence can be legally admitted as competent

and sufficient for such corroboration, which does not tend to confirm the testimony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant.

That case did not present any question of the form of instructions to the jury upon the effect of the whole evidence in the case, but only as to the competency and sufficiency of particular portions of evidence for the purpose under consideration. Subsequent cases in this court have presented both classes of questions, and it will be convenient to state the decisions on each class separately.

In the instructions which Mr. Justice METCALF, in *Commonwealth v. Brooks*, 9 Gray, 299, said "conformed to the settled law," and in those which Mr. Justice WELLS, in *Commonwealth v. Snow*, 111 Mass. 411, declared to be unexceptionable, the jury were told that the evidence, to be corroborative, must be of facts which connected the defendant with the commission of the crime charged. But as in each of those cases the defendant was convicted, and no exception could be taken by the Commonwealth, it is evident that the only point really adjudged was that the instructions were sufficiently favorable to the defendant.

By the instructions in *Commonwealth v. Price*, 10 Gray, 472, to which the defendant was held to have no legal ground of exception, the jury were told, that the evidence of the accomplices being unsupported by any corroboratory evidence, it was unsafe, on account of its corrupt and suspicious source, to convict upon it without confirmation; and the jury were advised to acquit; but that nevertheless it was competent for them to convict upon the uncorroborated testimony of the accomplices alone; and if, upon the whole evidence, they were convinced beyond a reasonable doubt of the guilt of the defendant, their verdict should be guilty, otherwise not guilty. There being no corroborative evidence whatever, no question was there presented as to how far such evidence, if offered, must go.

But in *Commonwealth v. O'Brien*, 12 Allen, 183, the instruction, to which this court held the defendant to have no ground of exception, was merely that unless the testimony of the accomplice was corroborated upon a material point, the defendant was entitled to an acquittal. And in *Commonwealth v. Larrabee*, 99 Mass. 413, the judge instructed the jury, that although he could not say to them that they could not convict upon the uncorroborated testi-

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mony of an accomplice, yet it was not safe for them to do so ; and that before considering the testimony of an accomplice, they ought to see whether he was corroborated ; that it was not necessary for his whole story to be corroborated, but that corroboration in some material particular was sufficient ; and exceptions to these instructions were overruled. It is to be observed, however, that in neither of these two cases had the judge been specifically requested to instruct the jury that the accomplice must be corroborated in some point tending to prove the defendant's guilt.

In *Commonwealth v. Scott*, 123 Mass. 222, there was evidence tending to corroborate the testimony of the accomplice which went to connect the defendants with the crime, as well as the other parts of his testimony ; and the judge instructed the jury that the testimony of the accomplice should be scrutinized with extreme caution, and that it was not safe or prudent to convict upon the evidence of the accomplice alone, unless he was corroborated in important and material respects in matters vital to the issue in the case. The point adjudged was, that there was no established rule of law which required the judge to advise the jury to acquit, unless there was corroboration of the statements of the accomplice connecting the defendants with the crime ; and that the defendants therefore had no ground of exception to the instruction given, or to a refusal to instruct the jury that the corroboration required of the accomplice was not the corroboration of that part of his story which related to his own acts and declarations, but corroboration of that part of his story which connected the defendants with the crime.

We have no doubt of the correctness of that adjudication. The opinions of the twelve judges of England in *Atwood's* case and of the Court of Criminal Appeal in *Stubb's* case, and the general current of authority in England, as we have already seen, sustain the position that the refusal of a judge to advise the jury that it is not safe to convict on the testimony of an accomplice, unless corroborated as to his statements connecting the defendant with the commission of the crime, though a departure from the usual practice, is not such an error in law as to authorize an appellate court, having, in the form in which the case is brought before it, jurisdiction of questions of law only, to set aside the verdict. And the decisions of the greatest weight in this country are to the same effect. *State v. Haney*, 2 Dev. & Bat. 390; *People v. Costello*, 1 Den. 83; *State v.*

Potter, 42 Vt. 495; *State v. Litchfield*, 58 Me. 267; *Carroll v. Commonwealth*, 84 Penn. St. 107.

But the question how far a defendant has a right of exception to the refusal of a judge, in submitting the whole case to the jury, to advise them in a particular form as to the amount of corroboration which will make it safe for them to convict, is wholly different from the question of the right of the defendant to except to the admission of evidence, against his objection, for such a purpose as to attribute to it an effect to which it is not by law entitled.

The decision in *Commonwealth v. Bosworth* has for forty years been treated as settling, that if evidence is admitted for the purpose of so far corroborating the testimony of an accomplice as to make it safe for a jury to convict, which is not legally to be considered as corroborative in that sense, the error may be revised by bill of exceptions. *Commonwealth v. Desmond*, 5 Gray, 80; *Commonwealth v. Savory*, 10 Cush. 535, 538; *Commonwealth v. Larrabee*, 99 Mass. 413, 416. And we are not aware of any case in which evidence which fell short of proving such acts or admissions of the defendant, or such participation with the accomplice at some stage of the transaction, as tended to prove the defendant's guilt, has been held by this court to be legally sufficient to constitute such corroboration.

In this Commonwealth, indeed, as in England, evidence which tends to prove the guilt of the defendant is sufficient by way of corroboration, although it does not directly confirm any particular fact stated by the accomplice; as for instance, evidence of the possession of stolen goods by one indicted for stealing or receiving them. *Commonwealth v. Savory*, 10 Cush. 535; *Rex v. Wilkes*, 7 C. & P. 272; *Regina v. Birkett*, 8 id. 732; *Regina v. Mullens*, 3 Cox's C. C. 531. So, where the defendant attempted to prove an *alibi*, and there was evidence tending to show his presence at the time and place of the commission of the crime, and it appeared that his brother, who, the accomplice had testified, was present when the defendant confessed facts showing his participation in the crime, was not called by the defendant as a witness. *Commonwealth v. Brooks*, 9 Gray, 299. See, also, *People v. Dyle*, 21 N. Y. 578; *State v. Wolcott*, 21 Conn. 272.

So it has been held that evidence that the defendant said to the officer who arrested him, that the accomplice had nothing to do with the robbery, warranted the inference that the defendant knew the circumstances attending it and the persons who were engaged

in its commission, and that this knowledge was derived from his own participation in the crime; and therefore tended in some degree to corroborate in a material particular the testimony of the accomplice as to the complicity of the defendant. *Commonwealth v. O'Brien*, 12 Allen, 183.

In *Commonwealth v. Larrabee*, 99 Mass. 413, the testimony which was ruled to be sufficient, if believed, to constitute corroboration in a material particular, was of two kinds: 1st. Evidence tending to show that the defendants and the accomplice were seen driving together on a certain day in apparent intimacy toward the place where the horses were stolen on the evening of that day, and were also seen together at another place with the horses on the next day, was held to tend materially to corroborate the accomplice, because it proved joint action at some stages of the transaction, and tended to show the participation of the defendants in the larceny; 2d. The defendants having introduced their own and other testimony tending to disprove the whole story of the accomplice, evidence to contradict their testimony as to the place where they met the accomplice was held admissible, because it went to show the falsehood of the defendants' own testimony, and indeed of their whole defense, which was a most material particular directly tending to prove their guilt.

In *Commonwealth v. Elliott*, 110 Mass. 104, the testimony which was ruled at the trial of an indictment for breaking and entering a building, and held by this court to be a material fact tending to corroborate the accomplice, was admitted in connection with testimony that the offense was committed about midnight, and was that the defendant and the accomplice were seen together going toward the place just before midnight, and returning an hour or two afterward. And in *Commonwealth v. Snow*, 111 Mass. 411, there was independent evidence of various acts and statements of the defendant himself tending to prove that he had committed the crime.

In *Commonwealth v. Scott*, 123 Mass. 222, no exception was taken at the time of the introduction of any portion of the evidence to its admissibility or effect for the specific purpose of corroborating the accomplice, and the *dicta* in the opinion, which might, taken by themselves, seem to support the theory that evidence may properly be held competent as corroboration of an accomplice, in the sense of rendering it safe and prudent for a jury to convict, which does not tend to connect the defendant with the

crime, were not requisite to the decision, and appear to the court upon further consideration to be based upon too limited a view of the judgment in *Commonwealth v. Bosworth*, for the reasons that we have already stated at large in commenting upon that case.

In *Commonwealth v. Drake*, 124 Mass. 21, a woman was indicted for procuring an abortion, and denied (as the opinion assumes, by her own testimony) that the woman upon whom the abortion was committed, or her companion, Wyman, was ever in the defendant's house, as Wyman had testified; and it was held, that even if Wyman was an accomplice, evidence from other sources that the two did go there, and that Wyman accurately described the interior of the house, corroborated Wyman in a material point; it was a material fact, bearing on the defendant's connection with the crime, that the woman on whom the illegal operation was performed, and whom the defendant had testified to have never been in her house, had been there.

In the case at bar the indictment charges the defendant with burning a barn and shed in Great Barrington, in the night-time of September 11, 1878. At the trial a youth, who was admitted to have been an accomplice, was called as a witness, and testified in substance that on the evening of Saturday, September 2, he was at certain places, with other persons whom he named, in Great Barrington, and on his way home alone about eleven o'clock discovered the defendant attempting to set fire to the buildings, but they were not burned that night; that the defendant then said to him that the buildings would be burned on the next Saturday or Sunday night, and that if he would keep silence, and would be where he could have witnesses to prove where he was during those nights, and after the burning, would give out that he burned the buildings himself, the defendant would make it all right with him; that they then separated, and the witness went directly home to his father's house, and arrived there and was let in by his father a little after midnight, and went to bed; that about the middle of the following week the defendant met him, and gave him four ten-dollar bills; that on the morning of Monday, September 11, the witness heard that the buildings had been burned; that several weeks after the fire the defendant made statements to him, amounting to admissions of guilt; and that once in the following spring, when the defendant and one Warner were working on some railroad ties,

the witness spoke to the defendant, but could not remember what was said.

The evidence offered in corroboration of this witness was merely that he was at the other places and with the persons whom he named in Great Barrington on the evening of September 2, and returned to his father's house a little after midnight, and his father got up and let him in, and he went to bed; that on Sunday, September 10, he showed his brother four ten-dollar bills, and on several occasions, some days after the fire, he was seen to have in his possession one or more ten-dollar bills; and that in the following spring, at the time when the defendant and Warner were at work on the railroad ties, the defendant and the accomplice were seen standing a few feet off, and the witnesses thought they talked together, but did not know any thing they said.

The whereabouts of the witness, when not in the defendant's company, on the evening of September 2, was wholly immaterial. His possession, on September 10, the day preceding the night of the fire, and at other times afterward, of bank bills (corresponding in number and amount with those that he testified to having received from the defendant, but not otherwise shown to have ever been in the defendant's possession), even if it tended to show that the witness had been hired to commit the crime, had no tendency to prove that the defendant was the person who so hired him. None of the testimony offered in corroboration of the accomplice had the slightest tendency to prove any facts connecting the defendant with the crime charged, or any participation of the defendant with the accomplice at any stage of the transaction, or would have been competent independent evidence against the defendant for any purpose. Except as to the part relating to the standing and talking together in the following spring (which hardly proved any thing), it related wholly to facts not shown to have occurred in the presence of, or to have been known to, the defendant; and therefore gained no weight as corroborative evidence from the fact, stated in the bill of exceptions, that the defendant, testifying in his own behalf, denied his guilt, and denied all the statements of the accomplice as to the interviews before the fire, and the payment of money to him by the defendant, and all his statements connecting the defendant in any manner with the fire.

The bill of exceptions shows that all the evidence in question was

offered in corroboration of the accomplice, and was, before its admission, objected to by the defendant as immaterial, incompetent, and not admissible to corroborate the accomplice, and as not tending to corroborate him in any material point; that its admission was accompanied by a ruling of the judge, in the hearing of the jury, which would naturally, if not necessarily, be understood by them to declare that all the evidence so admitted ought to be considered as so corroborating the testimony of the accomplice in its material parts, as, if believed, to make it safe and proper for the jury to convict the defendant; and that to such admission of the evidence the defendant excepted. The objection to the effect allowed to the evidence by way of corroboration is much more distinctly and fully reserved in this case than by the exception which was sustained by this court in *Commonwealth v. Bosworth*.

It is proper to add, that Mr. Justice MORTON finds himself unable to concur with the other judges in the view above taken of the cases of *Commonwealth v. Bosworth* and *Commonwealth v. Scott*, but the court is unanimous in the opinion that the evidence objected to did not tend to corroborate the accomplice in any material point, and that the exceptions must be sustained.

Exceptions sustained.

NOTE BY THE REPORTER.—The same view, both as to the effect of an accomplice's testimony and the character of corroborating evidence, was taken in *State v. Hyer*, by the New Jersey Supreme Court, 10 Vroom (39 N. J. Law), 598. The court said:

"The legal competency of accomplices as witnesses is clearly established. Indeed, it is said to be the policy of the law to invite such persons to come forward and expose undiscovered participants in their guilt. *Jordaine v. Lashbrooke*, 7 T. R. 609. Yet tainted as they are with confessed criminality, and testifying, as they often do, under the strong motive of hope of favor or pardon, it is but natural to withhold from them that faith in their testimony which we accord to the upright, disinterested and innocent. It was reasonable that courts should regard their testimony with suspicion, and look carefully into the secret motives that might actuate bad minds to draw in and victimize the innocent; and consequently there has grown up in the courts a settled practice quite universal, and entitled in its observance almost to the reverence of law, to advise jurors, in the strongest cautionary terms, not to convict defendants on such testimony, unless they can find corroboration in the testimony of other and unsuspected witnesses, upon such material circumstances as tend directly to establish the guilt of the accused. And quite frequently do the courts, in their discretion, direct juries to acquit, and set aside verdicts founded on the testimony of uncorroborated accomplices. But I think it may be asserted as the law, that when the jury acting upon such testimony, he being a legal witness, find a verdict of guilty, it is a lawful verdict, and cannot be disturbed on error.

"It would be illogical to place all accomplices, or accomplices in every character of crime, upon the same footing. Evidently the nature of the crime of which he acknowledges himself to be guilty must vary the weight that a jury will accord to his testimony; the reasonableness of his story, and his manner of testifying, must be considerations affecting his credibility, and tending to shape the advice of the judge. If the offense be one free from moral turpitude, the story told reasonable, the manner of its relation evincive of truthfulness,

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the jury might, even under the influence of the strongest caution, feel bound in conscience to believe it, and convict. To deny to a conviction, under such circumstances, legal support, would be to take from the jury the right of judgment upon the weight of testimony of legally competent witnesses — a right within their province — and to compel them to find against their convictions of its truth.

"The wise practice of courts to admonish jurors against too great reliance on the evidence of *particeps criminis*, found much support in the circumstance that the mouth of the accused was closed against the accusations of his criminality, while the self-convicted criminal was allowed to speak. The admission of persons accused of crime, as witnesses in their own behalf, has removed this one ground for disfavoring such testimony. But while cogent reasons still exist for scrutiny and distrust of evidence from such impure sources, I have not fallen in with any case condemning a conviction founded on the uncorroborated testimony of an accomplice as illegal. On the other hand, I find cases of high authority in support of such conviction.

"In the well-known case of *Atwood v. Robbins*, 1 Leach's C. C. 464, tried before Justice BULLER, for robbery from the person, the only evidence to identify the prisoners and connect them with the robbery was the testimony of an accomplice, testifying that the defendants with himself constituted the three persons who committed the crime; the case was given to the jury and a verdict of guilty had. The propriety of this verdict was referred to the twelve judges of England, who by a unanimous vote pronounced it to be legal. And in the subsequent case of *Rex v. Durham*, 1 Leach's C. C. 478, Baron PERRY, one of the judges who sat in the *Atwood & Robbins* case, permitted the case to go to the jury upon the sole evidence of an alleged accomplice, stating that the twelve judges who sat in the *Atwood & Robbins* case were unanimously of opinion that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the court than a rule of law. Lord ELLENBOROUGH, in the case of *Rex v. Jones*, 2 Camp. 131, remarks that 'No one can seriously doubt that a conviction is legal, though it proceed on the evidence of an accomplice. Judges, in their discretion, will advise a jury not to believe an accomplice, unless confirmed.'

"ALDERSON, B., in *Rex v. Wilkes*, 7 C. & P. 272, in summing up to the jury, says. 'You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony, but I advise jurors never to act on the evidence of an accomplice only, unless he is confirmed as to the particular person charged with the offense.' The same language substantially was used by Lord ABINGER, C. B., in directing the jury in *Reg. v. Farler*, 8 C. & P. 906. In the case of *Reg. v. Stubbs*, 33 E. L. & Eq 552, at the trial before the Durham Sessions, corroboration of the testimony of an accomplice as to the connection of the prisoner with the offense was wanting, and the chairman instructed the jury that corroboration as to each prisoner was not necessary. The correctness of this direction was reserved for the judgment of the Court of Criminal Appeals, and it was unanimously decided by that court that it had no power to interfere. Chief Justice JARVIS says: 'It is not a rule of law that accomplices must be confirmed in order to render a conviction valid, but it is usual in practice for the judge to advise the jury not to convict on such testimony alone, and jurors generally attend to the judge's direction, and require confirmation, but it is only a rule of practice.' PARK, B., and Justices WIGHTMAN, CRESWELL and WILLES expressed themselves to the same effect, the latter remarking: 'This is not a question of law, but of practice, and questions of law only can be reserved for our opinion.' A number of cases to the same effect will be found collected in 1 Phillips' Evidence (10th Eng. ed.), ch. 6, § 2, note 1. Further reference to them is unnecessary.

"It will be found on examination that the rule in this country is the same. In 1 Whart. on Crim. Law, § 783, the author states that the preponderance of authority in this country is that a jury may convict a prisoner on the testimony of an accomplice alone, though the court may, at its discretion, advise them to acquit unless such testimony is corroborated on material points. And in the note in the sixth edition, a number of American cases are cited in support of the statement in the text. These cases recognize the same practice in our courts, to caution and advise juries against conviction upon such testimony alone. The corroboration which they are directed to look for must be upon matters material to the guilt of the accused, not as to the fact of the crime merely, but upon matters which connect the prisoner with the crime committed, and the number of accomplices testifying has

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no effect to dispense with or lessen the need of supporting proof. Such proof must come from sources untainted by the particular crime. They will show, further, that this is a practice merely — one, it is true, of high obligation on courts to observe — and that it is not a rule of law."

In *Kilrow v. Commonwealth*, 89 Penn. St. 480, the court charged the jury: "An accomplice who comes upon the stand to testify against a receiver of the goods he has stolen, necessarily occupies a position of disrepute, and yet the law makes him a competent witness; and did formerly, before defendants could testify for themselves in criminal cases, as a matter of necessity, for otherwise many guilty persons would escape the just penalty of their crimes, there being oftentimes no other sufficient evidence to insure their proper conviction, while their guilty companions are willing, through penitence, or some hope of benefit, to divulge the truth in reference to their secret crime. But from the very character of such witnesses, the law and the courts look with caution upon their testimony; yet being competent to testify, their credibility is entirely for the jury, and to be judged of as that of any other witness, taking into account their disreputable character and position, and while the jury would be warranted in finding any fact in the cause upon their unsupported testimony if fully credited and believed, yet we must say to you that it would be very unsafe and dangerous for the jury so to do — and this is the opinion of almost all the courts." "It is not necessary that an accomplice should be corroborated upon every material part of his testimony, for if this was required a conviction could be had without his testimony at all; but before a conviction should be had upon his evidence in any particular, he should be so corroborated in other material parts of his testimony by uncontradicted evidence as to impress the jury beyond a reasonable doubt of the truthfulness of his entire story. "When this is the case the law permits the jury to base a conviction upon such testimony." This was sustained on appeal.

In *People v. Gipeon*, California Supreme Court, Sept., 1879, 4 Pac. C. L. Jour. 108, the court said: "The courts have in almost numberless instances commented upon the testimony of accomplices — cautioning juries in respect to the general unreliable character of such testimony — and statutes have been passed, containing provisions similar to those of section 1111 of the Penal Code, to the effect that a conviction cannot be had upon the testimony of an accomplice unless corroborated by evidence which tends to connect the defendant with the commission of the offense; but the industry of counsel has not enabled him to find an authority in support of his proposition."

In *Johnson v. State*, 65 Ind. 209, the court said: "The objections urged against the testimony of Viquesney went only to his credibility as a witness, and not to his competency, and it was a question for the jury to determine what credit, if any, they would give to such testimony, under all the circumstances attending the trial of the cause. It has been decided by this court, and we think correctly, that while it is the duty of the court and jury to carefully scrutinize the testimony of an accomplice, yet a person may be convicted on the testimony of an accomplice alone, if his testimony shall be sufficiently satisfactory to the jury. *Ulmer v. State*, 14 Ind. 52; *Stocking v. State*, 7 id. 326."

In *State v. Wart*, 51 Iowa, 587, it was claimed that an accomplice was wholly uncorroborated. The court said: "If he was so corroborated as to connect the defendant with the crime, the verdict is fully sustained."

In Texas the statute requires that an accomplice shall be corroborated by "other evidence tending to connect the defendant with the offense committed." It has been held that this does not necessitate a circumstantial and detailed corroboration. *Myers v. State*, 7 Tex. Ct. App. 640. An accomplice cannot corroborate himself. *Hannahan v. State*, id. 684. Nor can one accomplice corroborate another. *Heath v. State*, id. 464. There is a similar statute in Oregon. See *State v. Odell*, 8 Or. 30.

The Georgia Code requires corroboration, and it has been held that the corroboration must be of circumstances tending to connect the prisoner with the crime. *Childers v. State*, 52 Ga. 106; *Middleton v. State*, id. 194.

In *Hamilton v. People*, 29 Mich. 173, it was held that what credit was to be given to the testimony of an accomplice, whether corroborated or uncorroborated, is a matter exclusively within the province of the jury. To the same effect is *White v. State*, 58 Miss. 216.

In *Lindsay v. People*, 63 N. Y. 143, the court said: "Although it is not usual to suffer a conviction upon the wholly uncorroborated evidence of an accomplice, and juries are ad-

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vised not to convict without a confirmation as to the material facts; still, if the jury are fully convinced of the truth of the statements of a witness thus situated, they may convict upon his testimony alone." "As we have seen, it is competent for the jury to convict upon the uncorroborated testimony of an accomplice, and when corroboration is deemed safe, or even necessary, the rule as to the manner and extent of the corroboration is not definitely settled. Learned judges have differed on the subject. Chief Baron Joy, in his treatise on the Evidence of Accomplices, page 98, after reviewing the cases, says: 'The only rule, therefore, which has the appearance of reason to support, is that which I have endeavored to show, has uniformly and without an exception been laid down and acted upon by the English judges, which is that 'the confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling truth,' without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect, according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge.' In *Rex v. Beckett*, 1 R. & R. Cr. Cas. 251, the twelve judges agreed that 'an accomplice did not require confirmation as to the person he charged if he was confirmed as to the particulars of his story.' This does not, of course, imply a confirmation as to wholly immaterial matters, for example, as to the place of his birth, his age, his residence, but the details of the crime and matters connected with it. *People v. Davis*, 21 Wend. 309, is not inconsistent with the authorities cited. The General Sessions of New York had charged the jury that the witnesses who were accomplices of the prisoner were not to be believed by them, unless confirmed by other credible witnesses, in respect to the facts connecting the prisoner with the possession of the forged bills or with the manufacture of them. Judge NELSON says of these instructions, that 'they were as favorable to the prisoner as the most liberal cases on the subject recommend; certainly more so than can be exacted of the court by the settled rules of evidence.' The absence of the witness from his house on the business of concealing the body of the deceased, upon the night in question, was a material part of the narrative, and when it was proved that the prisoner was going at the time and under the circumstances stated, in the direction of the alleged place of rendezvous, the confirmation of the witness as to his unusual absence from home, was not only a confirmation of a material part of the story, but indirectly tended to connect the accused with the crime. It being merely a rule of practice, and not of law, that an accomplice should be corroborated to justify a conviction upon his evidence, it is not essential that the confirmation when offered should point directly to the defendant, if it is of any part of the material statements of the witness, the question being in all cases whether the jury under all the evidence will believe the uncorroborated part of the testimony."

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(127 Mass. 450.)

Criminal law — marriage — solemnization — "lewd, and lascivious" cohabitation.

The statutes of Massachusetts provide, except in the case of Friends or Quakers, that magistrates or ministers may celebrate marriages, and also provide that marriages thus celebrated shall be valid although the magistrate or minister shall have exceeded his authority or jurisdiction; and do not enact that marriages not thus celebrated shall not be valid. *Held*, that a ceremony of marriage, performed in good faith by a man and a woman at a public religious meeting, no third person participating, and no magistrate nor clergyman nor any person supposed to be such being present, and neither party being a Friend or Quaker, is not a valid marriage under the law of Massachusetts, but the cohabitation of the parties thereunder is not "lewd and lascivious," within the statute.

CONVICTION of lewd and lascivious cohabitation with Martha A. Eaton. The defense was that the parties were lawfully married to each other.

At a public religious meeting called by the defendant, and held at a chapel in Worcester, Massachusetts, about fifty persons being present, but no magistrate or minister of the gospel being present, the defendant occupied the pulpit, gave out a text, talked awhile about repentance, read the first five verses of the twentieth chapter of Matthew, then came down the aisle, and Eaton came forward and read from the sixth to the tenth verse of the same chapter; they then joined hands, and the defendant said, "In the presence of God and of these witnesses, I now take this woman whom I hold by the right hand to be my lawful wedded wife, to love and to cherish, till the coming of our Lord Jesus Christ, or till death do us part;" Eaton thereupon said, "And I now take this man to be my lawfully wedded husband, to love, reverence and obey him until the Lord himself shall descend from heaven with a shout and the voice of the archangel and with the trump of God, or till death shall us sever;" the parties then bowed down, and the defendant offered prayer. There was no other marriage ceremony; neither party was a Friend or Quaker; the marriage ceremony was not conformable to the usage or practice of any religious sect; the parties were of full age, the defendant being a resident of Missouri, and Eaton being a resident of Worcester; the parties performed the ceremony in good faith as a marriage rite, and believed it constituted a valid marriage. Directly after the ceremony, and during the time covered by the indictment, the parties cohabited as husband and wife. Before the ceremony they had caused notice of their intention to be married to be entered in the office of the city clerk of Worcester, and the clerk had delivered to them the certificate required by the statute; and the certificate had been returned with a statement thereon, signed by the parties, stating that they had been married to each other by mutual public vows.

The judge ruled that no valid or lawful marriage had taken place; and instructed the jury that they would be warranted in convicting the defendant.

J. F. Manning, for defendant, cited 1 Bish. on Mar. & Div. §§ 283-287; Gen. Stats., ch. 106; §§ 21, 22; ch. 107, §§ 4, 5; *Mangue v. Mangue*, 1 Mass. 240; *Milford v. Worcester*, 7 id. 48; *Parton v.*

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Hervey, 1 Gray, 119; *Meyers v. Pope*, 110 Mass. 314; *Flora's case*, Quincy, 29, note; *Concord v. Goffstown*, 2 N. H. 263; *Hutchins v. Kimmell*, 31 Mich. 126; s. c., 18 Am. Rep. 164; *Dyer v. Brannock*, 66 Mo. 391; s. c., 27 Am. Rep. 359; *McCausland's Estate*, 52 Cal. 568; *Meister v. Moore*, 96 U. S. 76.

G. Marston, attorney-general, for the Commonwealth.

GRAY, C. J. In Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth; the canon law was never adopted; and it was never received here as common law, that parties could by their own contract, without the presence of an officiating clergyman or magistrate, take each other as husband and wife, and so marry themselves. *Milford v. Worcester*, 7 Mass. 48, 53; 2 Dane Ab. 291, 301; 2 Winthrop's Hist. New England, 43. This clearly appears on tracing the history of the legislation upon the subject; the whole of which, whether repealed or unrepealed, is by a familiar rule to be considered in ascertaining the intention of the legislature. *Church v. Crocker*, 3 Mass. 17, 21; *Eaton v. Green*, 22 Pick. 526, 531; *Commonwealth v. Bailey*, 13 Allen, 541, 545.

As early as 1639, it was "ordered and declared" by the General Court, "that there be records kept of the days of every marriage, birth and death of every person within this jurisdiction." 1 Mass. Col. Rec. 276; Anc. Chart. 43. In 1642, it was enacted that "the magistrates and other persons appointed to marry shall yearly deliver to the recorder of that court which is nearest to the place of their habitation the names of such persons as they have married, with the days, months and years of the same; and the said recorders are faithfully and carefully to enrol such marriages as shall thus be committed to their trust;" and in 1644, every new-married man was required "to bring in a certificate of his marriage, under the hand of that magistrate which married him, to the clerk of the writs," to be recorded. 2 Mass. Col. Rec. 15, 59; Mass. Col. Laws (ed. 1660), 68; (ed. 1672) 130; Anc. Chart. 181.

The requisite of solemnization before a magistrate or other authorized person, as essential to constitute a valid marriage, which had been clearly implied in these statutes, was distinctly expressed in the following statute of 1646: "As the ordinance of marriage is honorable amongst all, so should it be accordingly solemnized. It is therefore ordered by this court and authority thereof, that no

person whatsoever in this jurisdiction shall join any persons together in marriage, but the magistrate, or such other as the General Court or Court of Assistants shall authorize in such place where no magistrate is near. Nor shall any join themselves in marriage, but before some magistrate or person authorized as aforesaid. Nor shall any magistrate, or other person authorized as aforesaid, join any persons together in marriage, or suffer them to join together in marriage in their presence, before the parties to be married have been published according to law." Mass. Col. Laws (ed. 1660), 52; (ed. 1672), 102; Anc. Chart. 152.

In 1656 and 1658, the "commissioners for ending small causes in the several towns where no magistrate dwells" were "authorized and empowered to solemnize marriage between parties legally published;" "and all other commissions in this case are hereby made void." 4 Mass. Col. Rec., part I, 255, 322; Anc. Chart. 152. The provision of the Stat. of 1646, prohibiting persons to join themselves in marriage, except before a magistrate or other authorized person, continued in force throughout the period of the colony charter.

By the Prov. Stat. of 1692-3 (4 W. & M.), ch. 25, "every justice of the peace within the county where he resides, and every settled minister in any town, shall and are hereby respectively empowered and authorized to solemnize marriages, within their respective towns and counties, betwixt persons that may lawfully enter into such a relation, having the consent of those whose immediate care and government they are under, and being likewise first published" as therein directed; and "every justice and minister shall keep a particular register of all marriages solemnized before any of them, and make a return thereof" quarterly to the clerk of the sessions of the peace of the county, to be by him registered. 1 Prov. Laws (State ed.), 61; Anc. Chart. 242.

By the Prov. Stat. of 1695-6 (7 W. III), ch. 2, § 4, "for the better preventing of clandestine marriages," it is enacted that "no person other than a justice of the peace, and that within his own county only, or ordained minister, and that only in the town where he is settled in the work of the ministry, shall or may presume to join any persons together in marriage; nor shall any justice or minister join any persons in marriage other than such one or both of whom are inhabitants or residents in such county or town respectively;" with more specific provisions as to publication of banns and consent

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of parents and guardians, and a further provision that any justice, minister or other person offending against this act shall suffer a penalty, and be "forever after disabled to join persons in marriage," and be also liable to an action by the parent or guardian. 1 Prov. Laws, 209, 210; Anc. Chart. 283.

By the Prov. Stat. of 1716-17 (3 Geo. I), ch. 16, after reciting in the preamble the principal passage above quoted from the act of 1695-6, it is enacted that "the power granted ministers to join persons together in marriage be hereby enlarged, so as that where there shall be no settled ordained minister in any town or precinct, or where the only settled ordained minister of any town or precinct is himself to be married, it shall and may be lawful in such cases for the next settled ordained minister in another town within the same county to join in marriage the minister, or inhabitants of such town or precinct destitute of such settled ordained minister, if such minister or inhabitants desire it, according to the rules prescribed by the laws of this Province for the consummating marriages;" and penalties are imposed on ministers and clerks neglecting to return or record marriages. 2 Prov. Laws, 60; Anc. Chart. 416.

So by an act of 1773 (13 Geo. III), the authority of each minister of the Church of England within the Province to join persons in marriage (which had previously been limited to persons belonging to the town in which the minister himself dwelt), was not only extended to include persons usually worshipping with him and whose ministerial taxes he had a right by law to receive, although not belonging to the same town; but it was enacted that "where any minister of the Church of England is himself to be married, or where such minister shall be removed by death or otherwise, so that the religious society of Christians in which he presided shall be destitute of a minister, it shall be lawful in such cases for the next minister within the Province of the same denomination to join in marriage the minister, or any of the people constituting such religious society who may lawfully enter into such a relation." Mass. Perpetual Laws (Suppl'ts to ed. 1759), 632; Anc. Chart. 679.

These statutes plainly signify that by the law of the Province even a minister, authorized to solemnize marriages between other persons, could not marry himself.

The only other statutes of the Province which have come to our notice are one of 1727 (1 Geo. II), providing for the publication of banns of persons residing in places where there was no town clerk,

and one of 1763 (3 Geo. III) concerning the powers of ministers whose parishes were made out of two or more adjacent towns. 2 Prov. Laws, 464; Mass. Perpetual Laws (Suppl'ts to ed. 1759) 44; Anc. Chart. 462, 655.

The Province laws on this subject remained in force until after our Revolution; and it was before they had been changed by any statute of the Commonwealth that the marriage took place, the validity of which was brought in question in the leading case of *Milford v. Worcester*, 7 Mass. 48. In that case it appeared that in 1784 a man and a woman went together into a room where a justice of the peace happened to be, and in his presence, and before other witnesses, after producing a certificate that their intentions of marriage had been published, the man declared that he took the woman as his lawful wife, and she declared that she took him as her lawful husband, and each made to the other the vows and promises usual in contracting marriages; but upon the question whether this proceeding was directed and encouraged by the justice the evidence was conflicting. It was ruled by Mr. Justice (afterward Chief Justice) SEWALL at the trial, and held by the full court in an elaborate judgment delivered by Chief Justice PARSONS that if the proceeding had not the sanction of the justice as a magistrate, the marriage was void, and neither the woman nor her children took the settlement of the man. The position that the marriage, though not solemnized pursuant to the statutes, was yet a lawful marriage, had between parties competent to contract marriage, and not declared void by any statute, was fully argued and considered; and the court, while admitting the strength of that position in States the laws of which had prescribed no regulations for the celebration of marriages, was clearly of opinion that the provisions of our statutes, by necessary implication, prohibited persons from solemnizing their own marriages by any form of mutual engagement, or in the presence of any witnesses whatever.

The Stat. of 1786, ch. 3, manifested no intention to change the law in this respect. While it expressly repealed all former laws relating to the solemnization of marriages, it substantially re-enacted many of their provisions. It empowered justices of the peace within their counties, and stated and ordained ministers within their towns or parishes, to solemnize marriages; provided that when any such minister was himself to be married, it should be lawful for any other such minister within the same county to marry

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him; required "all persons desiring to be joined in marriage" to have their intention published, and to "produce to the justice or minister who shall be desired to marry them" a certificate of such publishment; obliged justices and ministers to keep records and make returns of the marriages solemnized by them; and made persons illegally solemnizing marriages, or neglecting to make returns, subject to penalties, and to be thereafter disqualified from joining persons in marriage.

It also contained a new provision, declaring marriages which had been or should be had and solemnized among Quakers or Friends, in the manner and form used and practiced in their societies, to be good and valid in law, and requiring the clerk or keeper of the records of the meeting at which such marriages should be had and solemnized to make returns thereof. (Stat. 1786, ch. 3, § 7.) This section, Chief Justice PARSONS tells us, was enacted in consequence of the general opinion of lawyers that such marriages were void before. *Milford v. Worcester*, 7 Mass. 56.

The Stat. of 1786 (after being amended in some unimportant particulars by the Stats. of 1795, ch. 7, 1817, ch. 61, 141, and 1820, ch. 55) was repealed by the Stat. of 1834, ch. 177, which contained similar provisions, but allowed resident ministers to solemnize marriages throughout the Commonwealth, and therefore omitted as unnecessary the specific provision of former statutes as to the marriage of ministers, and also declared — thereby clearly implying that some solemnization beyond the mere contract of the parties was considered essential — that "all marriages, between persons who might lawfully enter into that relation, heretofore solemnized by any justice or minister, be and they hereby are confirmed and made valid in law, although such justice or minister may have exceeded his authority or jurisdiction."

In the Rev. Stats. ch. 75, the provisions of the previous statutes are substantially re-enacted, and the following section is added: "No marriage, solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed justice or minister, or on account of any omission or informality in the manner of entering the intention of marriage, or in the publication of the banns; provided, that the marriage be in other respects lawful, and be consummated with a full belief, on

the part of the persons so married, or of either of them, that they have been lawfully joined in marriage." Rev. Stats., ch. 75, § 24.

The object of this section, as declared in the report of the Commissioners who framed it, was to adopt the principle stated in *Milford v. Worcester*, that a marriage would be lawful if solemnized before a justice or minister, although without publication of the banns and without the consent of parents or guardians; and to extend that principle so as to prevent marriages from being invalidated on account of some defect, not known or suspected by either party, in the ordination of the minister or the commission of the justice in whose presence the marriage ceremony was performed. That the commissioners understood the presence of some person, being or believed to be a magistrate or minister, to be necessary to the validity of every marriage of persons other than Quakers in this Commonwealth, clearly appears by their concluding sentence: "The essence of the contract is the assent of the parties; and if this assent is formally and solemnly given in the presence of one who is acting as a justice or minister, and who is honestly believed to be qualified as such, it furnishes all the security against fraud and surprise which the law was designed to provide for."

The existing laws upon the subject are mostly contained in the Gen. Stats., ch. 106; and the only modification since the Rev. Stats. that is worthy of notice is that by which, where the fact of marriage is required to be proved before any court, evidence of the admission of that fact by the defendant, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, is made competent. Stats. 1840, ch. 84; 1841, ch. 20; Gen. Stats., ch. 106, § 22. Evidence of the kind here mentioned is simply made competent, not controlling when the whole truth appears.

Under all changes in the form of the statutes it has always been assumed in this Commonwealth, and in the State of Maine, which was originally a part thereof, that (except in the single case of Quakers or Friends, whose marriages are made valid by a special provision limited to that sect, and, though not solemnized by any magistrate or minister, are witnessed, recorded and returned by the principal officer of the meeting at which the ceremony is performed) a marriage which is shown not to have been solemnized before any third person, acting or believed by either of the parties to be acting

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as a magistrate or minister, is not lawful or valid for any purpose. *Medway v. Needham*, 16 Mass. 157, 159; *Commonwealth v. Spooner*, 1 Pick. 235; *Meyers v. Pope*, 110 Mass. 314, 316; *Thompson v. Thompson*, 114 id. 566, 567; Stat. 1879, ch. 116; *Brunswick v. Litchfield*, 2 Greenl. 28; *Ligonia v. Buxton*, 2 id. 102; *State v. Hodgskins*, 19 Me. 155; *State v. Bows*, 61 id. 171, 177. See, also, *Dunbarton v. Franklin*, 19 N. H. 257, 266; *Northfield v. Plymouth*, 20 Vt. 582, 591; *Goshen v. Stonington*, 4 Conn. 209, 219; 10 Am. Dec. 121; *Bashaw v. State*, 1 Yerg. 177; *Denison v. Denison*, 35 Md. 361.

It is proper, however, to notice more particularly the Massachusetts cases on which the defendant's counsel relied.

The case decided by the Superior Court of Judicature of the Province in 1758, and cited in Quincy's Reports, 29, note, appears by the record, there referred to, to have been as follows: Flora, a negro woman, was indicted on the Prov. Stat. of 1696 (8 Wm. III), ch. 11, "to prevent the destroying and murdering of bastard children," which had this preamble: "Whereas many lewd women that have been delivered of bastard children, to avoid their shame and to escape punishment, do secretly bury or conceal the death of their children, and after, if the child be found dead, the said women do allege that the said child was born dead, whereas it falleth out sometimes (though hardly it is to be proved) that the said child or children were murdered by the said women their lewd mothers, or by their assent or procurement," and which therefore enacted that any woman who should be delivered of a child "which, if it were born alive, should by law be a bastard," and endeavor to conceal the death thereof, whether it were born alive or not, should suffer death as in case of murder, unless she could prove that the child was born dead. 1 Prov. Laws, 255; Anc. Chart. 293. The indictment alleged, in the usual form of an indictment for murder, that the defendant threw her child alive into a vault and immersed it in the water and excrements therein, and thereby drowned and suffocated it. The jury, by special verdict, found "that the said Flora is and from her nativity has been a negro slave; that she was never married according to any of the forms prescribed by the laws of this land, but that the person supposed to be the father of the said child was also a slave, and had kept her company with her master's consent for above a year and a half before that she was delivered alone of the female child men-

tioned in the indictment, and thrust the same child into the vault and under the excrements and water, and that the same child was taken out dead therefrom, and that by means of her so immersing the said child and concealing the death thereof, it cannot be known whether the said child was born dead or alive ;” and the jury found the defendant guilty or not guilty, according to the opinion of the court upon the question whether “the said female child, had it been born alive, would have been a bastard, within the meaning and design of” the statute on which the indictment was founded. “After mature advisement upon the said verdict, the court are of opinion that the said Flora is not guilty.” *Flora’s case*, Rec. 1758, fol. 295. We have no report of the grounds of that opinion ; but it may well be that the court thought that so highly penal a statute, changing the ordinary rule as to burden of proof in criminal cases, should be strictly construed, and that the case was not within the evil which it was intended to prevent, as expressed in the preamble.

In *Parton v. Hervey*, 1 Gray, 119, it was decided, 1st, that the age of consent in this Commonwealth, as by the common law of England, was fourteen in males and twelve in females ; and 2d, that the Prov. Stat. of 1695–6 (7 Wm. III) ch. 2, the Stats. of 1786, ch. 3, and 1834, ch. 177, and the Rev. Stats., ch. 75, §§ 15, 19, prohibiting justices and ministers, under a penalty, from solemnizing marriages of males under twenty-one or of females under eighteen, without the consent of their parents or guardians, did not make void the marriage of a girl thirteen years old, solemnized by a justice or minister without such consent. The decision on the first point finds additional and conclusive support in the Prov. Stat. of 1694–5 (6 Wm. & M.), ch. 5, § 5, which defined the age of consent to be in “the man fourteen years of age, the woman twelve.” 1 Prov. Laws, 172 ; Anc. Chart. 278 ; 2 Dane’s Abr. 301. The decision on the second point was in exact accordance with the statement of Chief Justice PARSONS in *Milford v. Worcester*, referred to in the Commissioners’ Report on the Revised Statutes, as already mentioned, that “when a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without publication of the banns of marriage and without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty of fifty pounds for a breach of his duty.” 7 Mass. 54, 55. The general statement of Mr. Justice BIERLOW in

the course of his discussion of this point—that, “in the absence of any provision declaring marriages, not celebrated in the prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute”—evidently had regard to the effect of specific regulations as to the publication of banns or the consent of parents, and not to the broader question, which was not before him, whether any presence of a third person was necessary. If the learned judge had intended to cast any doubt on the adjudication of that question in *Milford v. Worcester*, he would hardly have referred, as he did, to that case as supporting his statement. 1 Gray, 122.

In *Meyers v. Pope*, 110 Mass. 314, there was evidence that the parties went before a person whom they supposed to be a justice of the peace of the county, with the intent on the part of both to contract marriage before him; that in his presence and hearing the man said that the woman was his wife; and that they afterward cohabited together, believing themselves to have been then and thereby lawfully married. The extent of the decision, as stated by Chief Justice CHAPMAN, was that the provision of the Rev. Stats. ch. 75, § 24, and the Gen. Stats., ch. 106, § 20, already quoted (by which the law as declared in *Milford v. Worcester* had been so far modified as to make a marriage before a justice or minister, believed by either of the parties to be authorized, as valid as if he were in fact authorized to solemnize the marriage), should by a liberal construction be held to include a case “where the parties go before a magistrate or minister, make a marriage contract in some form in his presence, in the belief that he sanctions and assents to it in his official capacity, and cohabit as husband and wife afterward, believing that they are legally married, though the magistrate understands the matter differently, and does not intend to act officially in the matter.” 110 Mass. 316.

The presence of a person officiating, or at least believed to be officiating, as a justice or minister being (except in the case of Quakers) clearly required, according to a long course of legislative action and of judicial opinion, to constitute a valid marriage in this Commonwealth, it would be superfluous to examine the English decisions, or the cases cited at the argument showing that a different rule prevails in some other parts of the Union. Whether it is

wise and expedient so to change the law of Massachusetts as to allow an act, which so deeply affects the relations and the rights of the contracting parties and their offspring, to become binding in law by the mere private contract of the parties, without going before any one as a magistrate or minister, is a matter for legislative, and not for judicial consideration.

In the case before us, it appearing from the undisputed facts that in the ceremony performed by the defendant and the woman with whom he has since cohabited no third person participated or was understood or expected to participate in any way, and no civil magistrate or minister of the gospel, nor any person believed to be such, was present, and neither party was a Friend or Quaker, it was rightly ruled in the Superior Court that no lawful or valid marriage between the parties had taken place.

But it does not follow that the conviction was warranted by the evidence before the jury. *Milford v. Worcester*, 7 Mass. 57; SEDGWICK, J., in *Mangue v. Mangue*, 1 id. 240, 242. To support an indictment against a man for adultery, it is sufficient to prove sexual connection between him and the wife of another man. *Commonwealth v. Elwell*, 2 Metc. 190. To support an indictment for bigamy or polygamy, it is sufficient to prove that the defendant, being at the time lawfully married to one person, has married another. *Commonwealth v. Mash*, 7 Metc. 472; *Reynolds v. United States*, 98 U. S. 145. But to support this indictment on the Gen. Stats., ch. 165, § 6, it is necessary to prove not only that a man and a woman, "not being married to each other," "cohabited together," but that they so cohabited "lewdly and lasciviously," — implying an evil intent, which cannot be inferred from the mere fact (such as was proved at the trial) of cohabitation under an honest, though mistaken belief that the parties were lawfully married to each other. *Commonwealth v. Hunt*, 4 Cush. 49. If there were evidence that the cohabitation was under such circumstances as to create a common scandal, or tend to corrupt the public morals, the case might be different. See *Commonwealth v. Calef*, 10 Mass. 153; *Grisham v. State*, 3 Yerg. 589; *State v. Moore*, 1 Swan, 136.

Verdict set aside.

Hunter v. Farren.

HUNTER V. FARREN.

(127 Mass. 481.)

Nuisance — blasting — measure of damages — interruption of business.

Where stones were thrown against plaintiff's shop by a blast, carelessly set off by a contractor employed on a neighboring public work, and his workmen left his shop in fear, and his business was consequently suspended, *held*, that he might recover for the interruption of his business, and the measure of damages was the value of the work thus prevented from being done.*

ACTION for injury to plaintiff's business by interruptions caused by blasting. The defendant, under a contract with the Boston, Hoosac Tunnel & Western Railroad Company, blasted rocks; and while so blasting, pieces of the rock were frequently thrown upon the plaintiffs' premises lying adjacent and near to the railroad. The plaintiffs' workmen employed upon their premises, being reasonably apprehensive of danger from flying stones, voluntarily vacated the premises at the time of each blast, notice of which was given by the blowing of a horn by some one in the defendant's employ, to notify travellers upon an adjacent highway. This action was brought to recover the damage caused by this interruption and the workmen's loss of time. The opinion states other facts. Verdict for plaintiffs.

A. De Wolf, for defendant.

M. Wilcox, for plaintiffs.

AMES, J. In this action damages are claimed for negligence and carelessness on the part of the defendant in the doing of certain acts, which he might lawfully do, provided that in doing them he used due and proper care. The verdict of the jury is to the effect that he did not use such care, and that the plaintiffs suffered injury and damage from that cause. As to so much of the damage as consisted of direct and immediate injury to the buildings, compensation has been made, with a distinct reservation on the plaintiffs' part that they did not, by accepting that compensation, waive any part of their claim for damages arising from the interruption of

* See *St. Peter v. Dennison* (58 N. Y. 416), 17 Am. Rep. 258, and note, 268.

their business. It appeared also, that before each blast notice was given by the sounding of a horn, upon which, and under a reasonable apprehension of danger, the plaintiffs' workmen immediately left off their work and vacated the buildings, so that the plaintiffs' business suffered much interruption, and they sustained damage for which they have received no compensation. If this damage can be said to be special, and not implied by law from the description of the wrong, it is at least sufficiently averred in the declaration.

The rulings requested by the defendant were properly refused. It may be true, as stated by BIGELOW, J., in *Mellen v. Western R. R.*, 4 Gray, 301, that "great latitude of discretion is to be allowed to those who are intrusted by law with the erection and maintenance of great public works," but this latitude never has been held to go so far as to afford an excuse for carelessness, negligence or wanton disregard of the rights of individuals. This suit is not an action of trespass *quare clausum*, but in the nature of a special action on the case. The court therefore properly ruled that the adjustment of the damages to the real estate was no bar to the action; it being understood by both parties that the damage by interruption of the plaintiffs' business was not included in the settlement. The plaintiffs' workmen were driven from the building by a reasonable and well-founded apprehension of immediate danger to life and limb, from an act which the defendant was about to commit in a careless and improper manner. The damage to the plaintiffs so occasioned was the natural result, and not a mere remote consequence, of the defendant's want of care. 2 Greenl. Ev., § 254. It was an injury, distinct and separate in its nature from the damage to the building, and not a mere matter in aggravation of that damage. The workmen left the building, not in consequence of the trespass, but to avoid the danger that was expected to be occasioned by a trespass that the defendant was about to commit. The measure of damages would be the value to the plaintiffs of the work which the defendant's negligence prevented from being done.

[But for a mistake in computation of damages]

New trial ordered.

Searle v. Sawyer.

SEARLE V. SAWYER.

(127 Mass. 491.)

Action — by mortgagee out of possession against purchaser of timber from mortgagor.

A mortgagee of land out of possession may maintain an action for conversion against one who buys from the mortgagor wood and timber which the latter has wrongfully cut from the premises, but whether the cutting is wrongful is a question of fact, and depends on circumstances.

ACTION for conversion of timber, etc. The opinion states the case. The plaintiff had judgment below.

D. W. Bond and J. B. Bottum, for defendant.

D. Hill, for plaintiff.

MORTON, J. This is an action of tort for the conversion of a quantity of wood and timber.

It appeared at the trial that one Warren, being the owner of a lot of wood-land, mortgaged it to the plaintiff's testator; and that after the condition or the mortgage was broken, but before the mortgagee had taken possession, Warren cut the wood and timber in question and sold it to the defendant. The presiding justice of the Superior Court ruled that "if the defendant bought of the mortgagor wood and timber cut from the mortgaged premises, and exercised such acts of ownership over the same as would amount to a conversion, then he would be liable to the mortgagee for the value of the same, without any previous demand, and although he bought the same in good faith and without any notice or knowledge of any claim upon the same." To this ruling the defendant excepted.

Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor; and that he has no property in wood or timber cut and removed, so

as to enable him to maintain trover for its conversion. *Peterson v. Clark*, 15 Johns. 205; *Cooper v. Davis*, 15 Conn. 556. On the other hand, it has been held in Maine, New Hampshire, Vermont and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him. *Gore v. Jenness*, 19 Me. 53; *Frothingham v. McKusick*, 24 id. 403; *Smith v. Moore*, 11 N. H. 55; *Langdon v. Paul*, 22 Vt. 205; *Waterman v. Matteson*, 4 R. I. 539.

We are not aware that this precise question has been adjudicated in this State, but the previous decisions of this court, in regard to the rights of mortgagees and the nature of their interest in the mortgaged estate, are such as to lead to the conclusion that a mortgagee out of possession is entitled to timber, fixtures and other parts of the realty wrongfully severed, and may recover them, or their value, if a conversion is proved. In *Fay v. Brewer*, 3 Pick. 203, it was held that a mortgagee in possession, but before foreclosure, could maintain an action on the case in the nature of waste against a tenant for life, for cutting down trees on the mortgaged land before he took possession, and the court in the opinion comment on the case of *Peterson v. Clark*, 15 Johns. 205, as not being of authority here, "since the law of mortgage in New York is so different from our own."

In *Page v. Robinson*, 10 Cush. 99, it was held that a mortgagee, after condition broken, though not in actual possession, could maintain trespass against the mortgagor, or one acting under his authority, for cutting and carrying away timber-trees from the mortgaged premises, without license express or implied from the mortgagee.

In *Cole v. Stewart*, 11 Cush. 181, it was held that an action at law would lie by a mortgagee not in possession against one who, under authority from the mortgagor, removed a building from the mortgaged land.

In *Butler v. Page*, 7 Metc. 40, a second mortgagee sold to the defendant a building standing on the mortgaged land, who took it down and removed the materials. It was held that the administrator of the mortgagor could not maintain trover for the materials, as the fee of the mortgaged premises was in the mortgagees, and the removal of the building vested no property in the materials in the mortgagor's representative.

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In *Wilmarth v. Bancroft*, 10 Allen, 318, a house standing on mortgaged land was partially destroyed by fire. The mortgagor sold to the defendant such materials as were saved, and brought this action to recover the price agreed to be paid. It was held that the fact that the mortgagee had claimed the agreed price, and forbidden the defendant to pay it to the mortgagor, was a good defense. The opinion is put upon the ground that the partial burning of the house, and the consequent severance of the unburnt materials, "did not terminate or affect the mortgagee's interest in the fixtures."

So it has been held in several cases that a mortgagee out of possession may maintain an action at law against the mortgagor or a stranger for removing fixtures and thus impairing the security. *Gooding v. Shea*, 103 Mass. 360; s. c., 4 Am. Rep. 563; *Byrom v. Chapin*, 113 Mass. 308; *King v. Bangs*, 120 id. 514.

The fair result of these authorities is that under our law a mortgagee is so far the owner in fee of the mortgaged estate that if any part of it is wrongfully severed and converted into personalty by the mortgagor, his interest is not divested, but he remains the owner of the personalty, and may follow it and recover it or its value of any one who has converted it to his own use. *Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston Water Power Co.*, 11 id. 11.

But the severance must be wrongful, and, where it is made by the mortgagor or one acting under his authority, whether it is wrongful or not will depend upon the question whether a license to do the act has been expressly given, or is fairly to be implied from the relations of the parties. The true rule is as stated in *Smith v. Moore*, 11 N. H. 55, and approved in *Page v. Robinson*, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed. The relation between a mortgagor and mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this State the mortgage contains a provision that the mortgagor may retain possession until condition broken. The object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used, and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the

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mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case, it is clear that he is entitled to take the annual crops, and wood for fuel. *Woodward v. Pickett*, 8 Gray, 617. And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If in carrying on similar farms it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case, that we are unable to say how far these considerations are applicable in the case at bar. But the ruling of the presiding justice seems to have been general, that the defendant would be liable if the wood and timber were cut from the mortgaged premises, and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury. We are of opinion that this question should be submitted to the jury, and therefore that a new trial must be ordered.

Exceptions sustained.

POTTER V. STEVENS MACHINE CO.

(127 Mass. 502.)

Corporation — undivided liability of stockholder — not enforceable by another stockholder or his assignee.

A stockholder of a corporation, who is also a creditor of the corporation, cannot enforce the personal liability of the stockholders for his debt, and one to whom he has assigned his claim, for the sole purpose of enforcing such liability, stands in no better position.

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BILL to enforce payment of a judgment. The opinion states the case.

L. Wallace & F. P. Goulding, for defendants.

T. L. Nelson & B. W. Potter, for plaintiff.

CORT, J. This is a bill in equity, filed May 5, 1876, against a corporation organized under the general laws of this Commonwealth, and against all the stockholders and members thereof, for the purpose of enforcing against the stockholders the payment of a judgment obtained by him against the corporation on three promissory notes.

The suit is brought under the provisions of the Stat. of 1862, ch. 218, § 4, for the benefit of the plaintiff and such other creditors as may come in and become parties to the proceedings. It seeks to charge the stockholders, on the ground that the corporation incurred the debts, claimed to be due, before the capital was fully paid in, and before the stockholders had paid in full the par value of their shares. The case was reserved upon the defendants' exceptions to the master's report.

It appears from the master's report, that the notes, upon which the plaintiff obtained his original judgment at law, against the corporation, belonged to Wright, one of the original stockholders, who is now made a defendant; and that the notes were assigned by Wright to the plaintiff, for the sole purpose of enabling him to conduct these proceedings in his own name, for the benefit of the former, with an agreement to secure him against any personal responsibility for cost and expense, and to pay him for his services. Under such an arrangement, the nominal plaintiff can have no greater rights, against the other stockholders, than his assignor would have. *Thayer v. Union Tool Co.*, 4 Gray, 75. All other claims proved before the master were for debts of the corporation to stockholders and directors in the company, who are also included among the defendants to the suit. All the defendants were subscribers to the stock. Some of them had paid in part for the stock subscribed, and some had not paid any thing, when this liability was incurred, and no certificates of stock had been issued to any one.

One of the exceptions to the master's report is, that the Stat. of

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1862 only provides a remedy by bill in equity for creditors who are not stockholders or officers of the corporation ; and therefore that the master was not authorized to find that the defendants are liable for the debts here found due. That is the question presented.

The rights of the parties are to be determined by the Stat. of 1862, which was in force when these debts were contracted and this corporation organized, but is now repealed by the Stat. of 1870, ch. 224, saving, in section 69, any rights already acquired, or liability incurred under existing laws. *Taylor v. New England Lithographic Co.*, 108 Mass. 523.

In the opinion of the court, the remedy provided by the statute in question is intended only for creditors who are not members of the corporation, and cannot be availed of by creditors who are also stockholders. The statute carefully defines the liabilities of officers and stockholders to creditors, and makes provision for enforcing the liability so defined ; the purpose is to declare the limits within which the corporators may enjoy the franchises and privileges granted, without personal liability to outside creditors. The intention is to protect third persons, who deal with the corporation in the faith that its financial condition is what it would be with all its capital paid in and its affairs managed according to the requirements of law. The remedy is fitted to enforce the liability of stockholders in favor of outside parties, and not to adjust the conflicting and complicated claims of stockholders among themselves, upon a final settlement of the corporate affairs. The requirement that all stockholders must be joined as defendants implies that those who are plaintiffs and those who join in the prosecution of the suit are creditors only, and not stockholders.

Under similar provisions in a former statute, this question seems to us to have been substantially decided. By that statute, members of a manufacturing corporation were made jointly and severally liable for debts contracted before the capital was paid in ; and their persons and property were made liable to be taken on any writ of attachment or execution against the company for such debt. Rev. Stats. ch. 38, §§ 16, 30. It was held in *Thayer v. Union Tool Co.*, above cited, that a creditor, who was also a stockholder, individually liable for its debts, could not take the property of other stockholders equally so liable, but must resort to his bill in equity against them for contribution. It was said that such a stockholder was

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not one having a debt against the company, which, as respected him and to him, the other stockholders were jointly and severally liable to pay; but that their ultimate liability to him was only to pay their proportionate part of the debt. It was further suggested, that while the plaintiff had the power to sue at law, and to enforce his claim against the property of the corporation, his remedy as against the other stockholders was for contribution, under the provisions of statute which give this court jurisdiction in equity in all suits for contribution by or between any persons who are respectively liable for the same debt or demand, when there is more than one person liable at the same time for contribution. Gen. Stats., ch. 113, § 2.

The Stat. of 1862 gives to creditors a remedy by bill in equity, instead of the right formerly given, to take the stockholders' property by attachment or on execution. The change in the form of remedy was made necessary, because the stockholder's liability was then first limited to the par value of the stock held by him; and being so limited, it was necessary that all the creditors should be made parties to a suit in equity, as well as all the stockholders, in order that the full extent of liability might be ascertained and apportioned among the stockholders according to the amount of their stock. See *Merchants' Bank v. Stevenson*, 5 Allen, 398. But this change of remedy does not diminish the force of the reasons given in *Thayer v. Union Tool Co.*, above cited, when applied to a case like this, arising under the more recent statute.

Exceptions to master's report sustained, and bill dismissed.

Exception sustained.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

HARDY V. PILCHER.

(87 Miss. 18.)

Negotiable instrument — evidence — character of signing.

In an action on a bill of exchange drawn by H. and accepted by B., "agent of H.," parol evidence is admissible, between the parties to the bill, to show that the intent was not to charge B. personally, but to charge H., whose funds were in B.'s hands.*

ACTION on a bill of exchange. The opinion states the case
The plaintiff had judgment below.

Rives & Rives, for plaintiff in error.

Price & Miller, and *Nugent & McWillie*, for defendant in error.

CHALMERS, J. The drawer of the bills of exchange sued on resisted payment upon the ground that there had been no presentment for payment, to the acceptor, and no notice of non-payment given to himself. Parol proof was admitted, against the objection of the drawer, which fully established the fact that the paper,

*To same effect, *Taylor v. French* (2 Lea, 257), 31 Am. Rep. 609.

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though in form a bill of exchange, should be treated as between the parties as a promissory note. Hardy, the drawer, being indebted to Pilcher, and having unrealized assets in the hands of his attorney, Bolling, the parties met to secure the indebtedness. Pilcher wrote the drafts or domestic bills sued on, and handed them to Hardy, who signed them. They were then handed to the attorney, Bolling, for acceptance. He declined to bind himself personally in any manner, but was willing, if desired, to accept as agent of Hardy and as binding the latter only. This being assented to, he wrote across the face of the bills, "Accepted, Wm. S. Bolling, agent of H. W. Hardy." It is evident that according to the true intent of the parties as thus disclosed, the bills were substantially the promissory notes of Hardy, and that the shape which the transaction took was intended only as a dedication *pro tanto* of the assets in the hands of Bolling, and for the better satisfaction and security of Pilcher. If therefore the testimony was admissible, the court below rightly instructed the jury that the drawer was liable, though there had been no presentment and notice.

Ordinarily, no intrinsic testimony of any kind is admissible to vary or explain negotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence *aliunde*. One of the few exceptions to this rule is, where any thing on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name, in which case testimony may be admitted between the original parties to show the true intent. Thus, where one has signed as agent of another, while the *prima facie* presumption is that the words are merely *descriptio personæ*, and that the signer is individually bound, yet it may be shown, in a suit between the parties, that it was not so intended, but that on the contrary, the true intention was that the payee should look to the principal, whose name was disclosed in the signature of his agent, or who was well known to be the true party to be bound. 1 Dan. on Neg. Inst., § 418; *Haile v. Peirce*, 32 Md. 327; *McClellan v. Reynolds*, 49 Mo. 312; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; S. P., 1 Am. Lead. Cas. 633. The principle, though not recognized in all the cases, is, we think, a sound one, and supported by the weight of authority. It is decisive of the case at bar.

Judgment affirmed.

EPPERSON v. NUGENT.

(57 Miss. 45.)

Infancy — necessities — counsel fees.

If an infant has no guardian, his estate is liable for fees of counsel whose services were beneficial in recovering the estate.*

PETITION against a guardian to subject a ward's estate to liability for counsel fees. The petitioner had judgment below.

W. S. Epperson, appellant, in person, with *Robert Bowman*.

W. L. Nugent, appellee, in person.

CAMPBELL, J. The liability of an infant for necessities is based on the necessity of his situation. As he must live, the law allows to any one supplying his wants a reasonable compensation. The law implies the promise to pay from the necessity of his situation. What are "necessaries" cannot be determined by any arbitrary and inflexible rule. It depends on circumstances, and each case must be governed by its own. It is stated in the books that the wants supplied must be personal to the infant, either for the body or the mind, in order to come within the description of necessities, and that counsel fees and expenditures in a lawsuit are generally excluded. This is, no doubt, the general rule, and for an obvious reason. Usually an infant who has an estate has a guardian, who may and should engage and pay counsel, where the interests of the infant committed to his guardianship require it.

When an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant and devoted his services to the protection of the interests of the infant in such litigation, and as the result of the litigation an estate has been secured to the infant, it is just and proper, and within the principle on which an infant is held liable for necessities, that the reasonable fees of such counsel should be paid out of the estate thus obtained. If the infant had had a guardian who had employed and paid counsel, he would have been entitled to reimbursement out of

* See *Decell v. Leventhal*, post.

Anding v. Levy.

the estate of his ward for the reasonable fees so paid, to be allowed on settlement by the Chancery Court. Shall the fact that the infant had no guardian, until the acquisition of the estate involved in the litigation in which the services of counsel were rendered made one necessary, deprive counsel of just compensation? We say, no! It will operate for the benefit of infants to allow just compensation for counsel fees and expenditures in their behalf in maintaining their rights in litigation which results in securing to them the means of supplying their wants. In *Pugh v. Dorsey*, 8 S. & M. 379, the jurisdiction of the Chancery Court to decree compensation to a lawyer who had rendered his services, as such, to minors was denied, on the ground that his remedy, if any, was at law. At that time the Probate Court had exclusive jurisdiction of minor's business, and the Chancery Court had nothing to do with minors as such. Now the Chancery Court has jurisdiction of minor's business, and "of all demands against the same." Const., art. 6, § 16; Code 1871, § 978.

The petition prays that the court shall ascertain what is a proper compensation for the services of the petitioner, and direct its payment by the guardian out of the estate of the minor, which the services of the petitioner contributed to secure. The court to which this application is made has jurisdiction of the person and estate of the minor, and is the appropriate tribunal to determine the matter brought before it by the petition. The case made by it commends itself to favorable consideration from the exceptional circumstances it presents.

Decree affirmed.

ANDING V. LEVY.

(57 Miss. 51.)

Account stated—assent to, implied only between merchants—doctrine as to others.

The doctrine of liability from retaining a stated account without objection is only applicable between merchants, but between other parties such retention is a circumstance for the consideration of the jury. (*See note, p. 439.*)

ASSUMPSIT. The opinion states the point. The plaintiff had judgment below.

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R. H. Thompson and A. C. McMaar, for appellant.

Sessions & Cassidy, for appellee.

GEORGE, C. J. [Omitting other points.] The action is based upon an account in favor of the plaintiff, commencing on the first day of March, 1877, and ending December 1, following. It embraces the whole period of the transactions between the parties, including that embraced in the account rendered. There is no item in it which indicates that an account had been rendered; but the items of charge, each being for the specific article sold, run regularly and without any interruption from March 1 to December 1, amounting in the aggregate to \$616.77; and then follow credits to the amount of \$340, without any dates. This account, as an open account, was sworn to by the plaintiff, under the statute, and filed with his declaration. The account claimed to be rendered, and therefore a stated account, commences with the beginning of the transaction between the parties, and the last item of debit in it is dated September 13, 1877. It contains on the credit side the first six items of credit embraced in the account sued on, the sixth item of credit being dated, in the account rendered, December 5, 1877. By this it appears that this account was not rendered till after December 5, 1877. No explanation is given why this rendered account, thus shown to have been made after the date of the last item of debit in the account sued on, should, as to its debit side, stop on September 13, leaving out items of charge against the defendant exceeding the sum of \$200, which accrued before the date of the last item of credit in the account. It is clear that it is not an account of the whole of the transactions between the parties up to the date it was made out. If it were regarded as a stated account, it must be regarded also as showing the true balance, if any, due by the defendant at the date at least of the last item on either side of the account. This date has been shown to be December 5, 1877, and under this theory, if we regard the account as stated, it would show that nothing was due to the plaintiff, as the account is exactly balanced. In this view, the account rendered would not be the proof which would show the verdict to be clearly right, but the contrary. But under the rules of law the account thus rendered cannot be considered, under the circumstances proved, as a stated account.

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A stated account is defined to be an agreement, after an examination of the accounts between the parties, that all the items are true, and the balance struck a just and true balance. *Stebbins v. Niles*, 25 Miss. 267, 348; *Davis v. Tiernan*, 2 How. 786, 804. But it is said that this agreement need not be express, but it may be implied from circumstances; and among these circumstances, are the rendition of an account by one of the parties, and its retention without objection by the other. This rule which presumes the acquiescence of the party to whom an account was rendered, from his mere failure to object to it, needs some explanation in the state in which we find the authorities. The earliest mention we have been able to find of this rule is in *Sherman v. Sherman*, 2 Vern. 276, decided in the year 1692, where the rule is stated by Lord HUTCHINS thus: that "among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or a third post." Lord HARDWICKE in *Willis v. Jernegan*, 2 Atk. 251, spoke of the rule thus, "even where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterward." Chancellor KENT in *Murray v. Toland*, 3 Johns. Ch. 569, mentioned the rule in these words: "It has been often held, that if a party receives a stated account from abroad, and keeps it by him for any length of time (one case says two years) without objection, he shall be bound by it;" citing *Willis v. Jernegan*, *ubi supra*, and *Tickel v. Short*, 2 Ves. 239, in which last case, Lord HARDWICKE said: "If one merchant sends an account current to another in a different country, on which a balance is made due to himself; the other keeps it by about two years without objection: The rule of this court and of merchants is, that it is considered as a stated account." The Supreme Court of the United States in *Freeland v. Heron*, 7 Cr. 147, spoke of the rule as "a rule of the Chancery Court and of merchants," and defined it to be thus: "When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to

cast the *onus probandi* on him." It is thus seen, that in its inception, the rule that the reception of an account rendered, and the keeping of it for any considerable time without objection, made it an account stated,—that is, an account so admitted to be just and correct that it relieved the party rendering it from the necessity of proving it, and cast the burden on the party receiving it to show by affirmative evidence that it was unjust,—was a rule of the Chancery Court applied only in controversies between merchants.

The rule has been extended further in some States, so as to embrace transactions between other parties. In this State, there has as yet been no recognition of it except in cases between merchant and merchant, and when it has been referred to it has been in that way. Thus in *McCall v. Nave*, 52 Miss. 494, 498, it was said that "assent" (to a stated account) "might be implied from circumstances, such as the receipt by one merchant of an account from another without making objections;" and in *Stebbins v. Niles*, 25 Miss. 348, SMITH, C. J., spoke of it as a rule in transactions between merchant and merchant. Greenleaf, in § 126, vol. 2, of his work on Evidence, says an admission sufficient to create an account stated may be inferred, "if the account be sent to the debtor in a letter which is received, but not replied to in a reasonable time," but he refers as authority for this to § 197 of vol. 1 of his work. This last-named section states the rule thus, "among merchants it is regarded as the allowance of an account rendered, if it is not objected to without unnecessary delay." In Virginia in *Townes v. Birchett*, 12 Leigh, 173, the opinion of the majority of the court applying the rule proceeds on the assumption that both parties were merchants, though Judge ALLEN dissented upon the ground that this character of the parties was not shown. He said that he had not been able to find a single case, not between merchant and merchant, in which the rule had been applied. And this view was sustained by the Court of Appeals of Virginia in *Robertson v. Wright*, 17 Gratt. 534, 541. It is stated in Cowen and Hill's Notes to Phillips on Evidence, note 191, that the rule is inapplicable except as to transactions between merchant and merchant.

In some of the late authorities the rule that the rendition of an account, and its retention without objection, makes it a stated account is applied to transactions between other parties than merchants. It has been so recognized in the following cases, among others: *Lockwood v. Thorne*, 11 N. Y. 170; *Stenton v. Jerome*, 54

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id. 480; *Case v. Hotchkiss*, 1 Abb. (N. Y.) 324; *Towsley v. Denison*, 45 Barb. 490; *Terry v. Sickles*, 13 Cal. 427; *White v. Hampton*, 10 Iowa, 238; *Tharp v. Tharp*, 15 Vt. 105; *White v. Campbell*, 25 Mich. 463; *Philips v. Belden*, 2 Edw. Ch. 1. On consideration of the authorities, we have concluded not to extend the rule, making the rendition of an account, and its retention without objection a stated account, beyond its original limits, viz.: controversies between merchant and merchant.

On the other hand, we do not follow some of the authorities, which hold that such rendering and retention is no evidence of the correctness of the account. The rendering of an account and its retention without objection, as between other parties than merchants, is admissible to show an implied admission and acquiescence in its correctness. What weight should be given to it is for the consideration of the jury, under all the circumstances of the case. They may consider the character, as a business-man, of the party to whom the account was rendered — whether careful, accurate, and prompt in business matters, or the contrary; his intelligence, or the want of it; his opportunities of examining the account, and of ascertaining whether it is correct; his dependence on his creditor, or the contrary, his confidence in the honesty and accuracy of the party who rendered the account; the length of time of the retention; the opportunities of making objections; the course of previous dealings between the parties, and all other circumstances attending the rendering and retention of the account; and from these determine the weight to be given to the evidence in establishing its correctness.

Judgment reversed and new trial granted.

NOTE BY THE REPORTER. — This point does not seem to have been raised or passed upon in *Lockwood v. Thorne*, 11 N. Y. 170. That was a case between tanners and leather merchants. The same is to be said of *Stenton v. Jerome*, 54 id. 480, a case between a stock broker and a customer. So of *Case v. Hotchkiss*, 1 Abb. Ct. App. Dec. 324, a case between attorney and client. So of *Towsley v. Denison*, 45 Barb. 490, a case between a vendor of stone and a canal contractor. So of *Terry v. Sickles*, 13 Cal. 427, where it does not appear that the parties were merchants. *White v. Hampton*, 10 Iowa, 238, is not at all in point. The question does not seem to have been raised in *Tharp v. Tharp*, 15 Vt. 105. All these cases, however, enforce the doctrine of account stated between others than merchants as an estoppel.

In *White v. Campbell*, 25 Mich. 463, the court said: "The rule itself is said to have been founded originally on the practice of merchants, and in Lord HARDWICKE's time it was stated to be a rule among merchants." But the doctrine was there applied to others.

Wharton (3 Ev., § 1140) speaks of the doctrine as prevailing in regard to transactions between "business men."

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In *Townes v. Birchett*, 13 Leigh, 173, the transactions were between a merchant and an auctioneer, the account being of auction sales.

In *Shepard v. Bank of Missouri*, 15 Mo. 141, this question was directly passed upon, and decided contrary to the principal case. The court said: "It is true these cases are between merchant and merchant, and are generally found in chancery proceedings; but there is no reason why the same doctrine should not prevail between any other persons with whom are accounts current or accounts of transactions in the ordinary course of business. There is a presumption of correction, of fairness and of truth, in the account thus kept, which becomes strong and forcible after the acquiescence of the party charged with it for months or years. The same reasons which adopt this rule among merchants will apply it to banks and their depositors."

In *Brown v. Kimmel*, 67 Mo. 430, the same was approved *obiter* in an action for professional services. The court said: "The point discussed by the counsel in this case is, whether on stated accounts or *in simul computassent* the rules of evidence in regard to such actions are confined to dealings between merchants. That question was decided by this court in *Shepard v. Bank of Missouri*, 15 Mo. 143, and that decision was recognized in the recent decision in *Powell v. P. R. R. Co.*, 65 id. 658. The rule of evidence no doubt originated in mercantile dealings and the reported cases usually relate to such dealings, but the principle seems to have been extended to all cases where the relation of debtor and creditor exists. *Wiggins v. Burkham*, 10 Wall. 129. The rule at best is a very flexible one, and undoubtedly depends in its application on the circumstances of each case, to be judged by the nature of the transaction, the habits of the business in which it occurs and the course of trade. *White v. Hampton*, 10 Iowa, 288. In a general way an account rendered by a creditor to his debtor, and not objected to within a reasonable time, is regarded as evidence of an account stated — that is of an account conceded by both parties to be correct. And it has been held that what is a reasonable time in which to make objections is a question of law to be determined by the court. There are cases in which this presumed acquiescence, arising from lapse of time and failure to object within a reasonable time, has been considered very slight evidence of the correctness of the account. *Kellam v. Preston*, 4 W. & S. 16; *Spangler v. Springer*, 22 Penn. St. 454; and others again where the courts have regarded it as conclusive, except where fraud or mistake is clearly shown. *Lockwood v. Thorn*, 11 N. Y. 170. It will readily be perceived, on an examination of the numerous cases reported on this subject, that they have been decided on the peculiar circumstances attending each case, and most generally in proceedings in equity. In no case has such implied admission been held to be an estoppel, but simply a *prima facie* case throwing the burden of contradiction or explanation on the adverse party. The case of *Phillips v. Belden*, 2 Edw. Ch. 1, and *Hutchinson v. Market Bank of Troy*, 48 Barb. 284, contains quite an extensive discussion of the subject. But it is unnecessary to examine the subject here, as the pleadings do not present the question. The action in this case is not on an account stated."

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(57 Miss. 243.)

Witness — statutory construction — husband and wife — criminal cases.

Under a statute providing that "husband and wife may be witnesses for each other in all criminal cases, but they shall not be required to testify against each other, as witnesses for the prosecution," neither is a competent voluntary witness against the other. (*See note, p. 444.*)

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CONVICTION of arson. The opinion states the case.

Tabor & Carter, for plaintiff in error.

H. M. Sullivan and *T. C. Catchings*, attorney-general, for State.

GEORGE, C. J. The plaintiff in error was indicted for arson and convicted. On the trial, his wife was offered by the prosecution as a witness against him. He objected to her competency; but the court, after informing her "that she need not testify against her husband unless she was willing to do so, and that the law would not compel her," adjudged that she was competent, if she testified willingly. The wife then proceeded to give very material testimony against her husband, a part of which was that the husband asked her to swear falsely in his behalf, as to the whereabouts of the principal witness for the State on the night of the burning. Exceptions were taken to this ruling of the court, as to the competency of the wife, but no additional exception was taken to the admission of the part of her testimony above stated.

At common law the husband and wife were incompetent as witnesses for or against each other. This incompetency was placed by the courts upon two grounds: One, the unity and identity of husband and wife in interest, so that when one was excluded on the ground of interest the other was also excluded; the other had reference to public policy. For as Greenleaf in his work on Evidence, vol. 1, § 334, says: "It is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence." In the Code of 1857, art. 190, p. 510, we find the first provisions in the legislation of this State to remove the incompetency of witnesses on account of interest. By art. 193, on the same page, husband and wife were made competent witnesses for each other in criminal cases.

In *Lockhart v. Luker*, 36 Miss. 68, the High Court of Errors and Appeals, omitting all consideration of the second ground above mentioned of the incompetency of husband and wife as witnesses for or against each other, decided that the wife might be a witness for her husband in a civil suit, because the husband might be a

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witness in his own behalf. But in *Dunlap v. Hearn*, 37 Miss. 471, the court overruled *Lockhart v. Luker*, and held, in accordance with the above quotation from Greenleaf, that there were grave reasons of public policy for the exclusion of husband and wife as witnesses for or against each other, besides the objection on account of interest; and they excluded, in that case, the wife when offered in a civil suit in behalf of her husband.

Under the Code of 1871, § 760, husband and wife are expressly made competent witnesses for each other in civil cases, and by § 759 it is provided that "husband and wife may be witnesses for each other in all criminal cases, but they shall not be required to testify against each other, as witnesses for the prosecution. Nothing herein contained shall be so construed as to debar full cross-examination by the prosecution of any husband or wife of an accused party who may be placed on the stand for the defense." The learned judge who presided in the court below held, that under this section, the wife may be a voluntary witness for the prosecution, against her husband's consent. We are constrained to differ from him in the construction he has placed on this statute. The statute is in derogation of a very ancient and well established rule of the common law, based, as we have above seen, in great part, upon grave reasons of public policy having reference to the preservation of the happiness of parties joined together in the marital relation. Statutes which are in derogation of the common law must be construed strictly, so as not to give them an operation and effect beyond the clearly expressed intention of the legislature. *Hopkins v. Sandidge*, 31 Mass. 668. Such statutes are to be construed with reference to the principles of the common law, and it is not to be presumed that the legislature intended to make any innovation on the common law further than the necessity of the case required. *Edwards v. Gaulding*, 38 Miss. 118; *Hollman v. Bennett*, 44 id. 322. The rule of the common law excluded them as witnesses both for and against each other, in criminal as well as civil cases. There was no difference as to their exclusion in either class of cases, and the rule was the same whether they were offered as witnesses for or against each other, except in a small class of criminal cases, where the wife was admitted to testify against the husband for her own protection and personal security. This being the state of the law, the legislature, by § 760, made them competent witnesses for each other in civil cases, leaving them still incompetent as witnesses against each other

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in that class of cases. In the section under consideration the language is, "husband and wife may be witnesses *for* each other in all criminal cases," clearly showing that the legislature intended to apply the same rule as to their competency in criminal and in civil cases. If the legislature had intended to make them witnesses against as well as for each other, it would have been an easy matter to express that intent in unmistakable language. No reason is perceived why the legislature should not have done so, if indeed they had that intent; nor is it easy to give a satisfactory reason why the legislature should make them witnesses against each other in criminal cases, when it is undoubted that they are restricted in civil cases to being witnesses for each other. The whole force of the implication, that the legislature intended to allow one to be a voluntary witness against the other in criminal cases, arises from the use of the words "but they shall not be *required* to testify against each other, as witnesses for the prosecution," following immediately after the provision allowing them to be witnesses for each other, and as a part of the same sentence. We regard this as rather an over-cautious insertion, to prevent an apprehended construction of the preceding words, than as engrafting a new and independent provision on the statute, which would be the case if it allowed the examination of one against the other, in case the party offered as a witness did not object.

But if we are to construe this language to mean that the legislature thought that by the common law husband and wife might be required to testify against each other when they were allowed to testify in behalf of each other; and to infer that this provision was inserted to prevent the operation of such a rule without the consent of the party offered as a witness, it does not follow that we are to construe the provision as making this erroneously supposed rule of the common law a part of the statutes of the State. An enactment of the legislature based on an evident misconception of what the law is will not have the effect, *per se*, of changing the law so as to make it accord with the misconception. *Davis v. Delpit*, 25 Miss. 445.

For the error in admitting the wife to testify against the husband, against his objection, the judgment is reversed and a new trial granted, and cause remanded.

So ordered.

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NOTE BY THE REPORTER.—The Albany (N. Y.) Oyer and Terminer, Justice OSBORN presiding, quashed the indictment of Briggs for the murder of Woods, for the reason that the prisoner's wife was allowed to testify for the people against her husband before the grand jury. The statute under which this testimony was introduced is as follows; "In all criminal trials and examinations before trial a husband or wife may be examined on behalf of the other, but upon no such trial shall a husband or wife be compelled to testify against the other." The court say, by Justice OSBORN: "Does this section confer the right claimed by the prosecution? It seems to me clearly not. The only innovation which this section makes upon the common law or the statutes as they formerly existed was to give a right to a husband or wife to be examined as a witness on behalf of the other in a criminal trial or examination. Suppose this were all of the section, would it be contended for a moment that either could be called as against the other? Of course not. Now, the other words are of a negative character. They certainly create no new right or privilege as to the husband or wife being witnesses that did not exist before." "The only construction that can be given to these words to warrant the position taken by the prosecution would be, that because the legislature said they could not be compelled to testify against the other, the inference is they might do so, if such testimony was voluntarily given. But it would be most dangerous to allow any such interpretation or construction of the section. Such an innovation upon the common law would require a positive, affirmative provision or enactment of the legislature. She could not be called as a witness in behalf of her husband until the legislature so enacted. She certainly cannot be called to give evidence against him until the authority is expressly given. It may be that the latter part of this section amounts to nothing. Certainly no one claimed before its enactment that husband or wife by any law that ever existed could be compelled to testify against each other. *Wylie v. People*, 53 N. Y. 225. But it may have been placed there (and I think this is the more probable reason for the employment of the language) to prevent a husband or wife after being called as a witness for the other, or on behalf of the other, as the language is, from being compelled on cross-examination to testify to facts injurious to the party in whose behalf he or she was called. For instance, a wife might be called as a witness on behalf of the husband to prove some one isolated fact. It may be that the legislature, by saying that she should not be compelled to testify or give evidence against him, intended to prevent upon a cross-examination an inquiry into any other matters not inquired of upon the direct examination, and which might be very damaging to the husband, and so vice versa. Whether this be the correct solution or not, is quite immaterial. It is enough that no positive enactment can be found making it proper to call husband or wife as a witness against the other. The following authorities (if indeed authorities are necessary on this point) go to substantiate this reasoning: 22 Alb. L. J. 81; *State v. Houston*, 50 Iowa, 512; *Dill v. State*, 1 Tex. App. 278; *Hubbell v. Grant*, 39 Mich. 641; *State v. Donovan*, 42 Iowa, 587."

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(57 Miss. 286.)

Statutory construction — "householder."

A "householder" is any head or chief of a domestic establishment, which he keeps together and provides for, but he need not be the actual occupant of a house.

CONVICTION of murder. The opinion states the case.

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Shands & Johnson, for plaintiff in error.

T. C. Catchings, attorney-general, for the State.

GEORGE, C. J. The plaintiff in error was indicted and convicted for the murder of Charles Gallagher, and sentenced to imprisonment in the State penitentiary for life. He assigns for error in the proceedings of the court below, that the court rejected as competent jurors Dale and Perry, who, upon their examination by the court, answered that they were not householders in De Soto county. The ruling of the court is in pursuance of the provisions of § 724 of the Code of 1871; but it is now insisted that this section is in conflict with § 13 of art. 1 of the Constitution of this State, which declares that "no property qualification shall ever be required of any person to become a juror."

If the term "householder" in the statute were interpreted to mean that it was necessary, in order to be a competent juror, that the person should be the actual tenant or occupant of a house, the statute would not be a violation of the Constitution, since a permissive occupancy as a tenant at will would fill the requirements of the statute; and such an occupancy would be in no proper sense a property qualification or right. Such a tenant has no certain and indefeasible estate, and nothing that he can assign to another. 2 Bl. Com. 145.

But we do not consider that the true meaning of the term "householder." In *Browne v. Witt*, 19 Wend. 475, the court declared that householder "means the head, master, or person who has the charge of and provides for a family, and does not apply to the subordinate members or inmates of the household." And in *Woodward v. Murray*, 18 Johns. 400, it was said, "household means a family living together, and a householder a master of a family." The same meaning was given to this term by the Supreme Court of Appeals of Virginia, in *Calhoun v. Williams*, 32 Gratt. 18.* In *Aaron v. State*, 37 Ala. 106, it was said that "the term householder is defined by Mr. Webster to mean the master or chief of a family, — one who keeps house with his family;" that it "means something more than the mere occupant of a room or house. It implies in its term the idea of a domestic establishment, — of the management of a household." In that case the court held that a

* *Post*.

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person who has merely rented a room for a year was not a competent juror under the statute of that State requiring a juror to be a householder. Our view is that the term householder in section 724 means a person who has a family, whom he keeps together and provides for, and of which he is the head or master. He need be neither a father nor a husband, but he must occupy the position toward others of head or chief in a domestic establishment. The statute refers to the civil status of the person who is to be a competent juror, and not to his property.

Judgment affirmed.

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(57 Miss. 308.)

Evidence — exhumation of dead body — when compellable,

In an action on a policy of life insurance, the defense was breach of warranty that the insured had never sustained any serious personal injury. The defendant adduced testimony of an attending physician that the deceased told him that he had been told that his skull had been fractured and trephined in boyhood. The defendant also offered to prove similar declarations to another, and on this evidence asked for the exhumation of the body of the deceased, after a lapse of eighteen months from the commencement of the action. *Held*, that the application was properly denied, the evidence being incompetent and the delay too great. (*See note, p. 448.*)

ACTION on a life policy. The opinion states the facts. The plaintiff had judgment below.

Buchanan & Houston, for plaintiff in error.

Houston & Reynolds, for defendant in error.

CHALMERS, J. This is a suit brought by Mrs. Brown upon a policy of life insurance taken out by her husband in his life-time, upon his life, for her benefit. The company defends upon the ground that the husband, in his application for the insurance, stated that he had never received any serious personal injury; whereas, in truth, he had in boyhood received a wound on the head by which

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his skull had been fractured, and been healed by the operation known as trephining. Upon the trial, which occurred about two years after the death of the insured, the company asked the court for an order to have the body of the deceased exhumed, with a view of ascertaining whether in fact such fracture had been sustained. The motion was based upon an affidavit stating that the defendant was advised and believed the fact to be so, but found it impossible to prove it, by reason of the fact that the boyhood of the insured had been spent, and the injury, if it occurred, had been received in Kentucky, and they found it impossible to produce any witnesses, living within the jurisdiction of the court, who could testify to the occurrence. The motion was denied, and we think, properly.

We are not prepared to say that in a proper case the court, in the interests of justice, should not compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there is strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. We are prepared to say, however, that such an order should be made only upon a strong showing to that effect. It would be a proceeding repugnant to the best feelings of our nature, and likely to be in many cases so abhorrent to the sensibilities of the surviving relatives that they would prefer an abandonment of the suit to a compliance with the order. Without undertaking to define with accuracy what circumstances would justify the making of such an order, we think that a case calling for it was not shown in this instance. The suit had been pending quite eighteen months before it was brought to trial, and during that time no steps had been taken to procure any testimony tending to establish the defense set up, nor was there any competent legal testimony adduced upon the trial with this view. It is true that the physician, who had attended the deceased in his last illness (which had no connection whatever with the alleged fracture of the skull), testified that the deceased told him that he had himself been told that when a child of four years of age he had met with such an accident; but it is quite evident that this could not be accepted as a basis for the desired order, since it was itself incompetent testimony. The deceased, according to this statement, knew nothing of the fact except from hearsay, and it is well settled that statements of a patient to his attending physicians are only admissible when they relate to his then present symptoms. If they

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consist of a narration of past events they are incompetent. *Chapin v. Marlborough*, 9 Gray, 244; *Bacon v. Charlton*, 7 Cush. 581; *Collins v. Waters*, 54 Ill. 485. The physician testified further, that when his patient made this statement to him, he examined his head and found marks of an old cicatrix, but he declined to say that it was evidence of a fracture and of trephining, and thought it equally likely to have been produced in other ways. The defendant then offered to prove by another witness that the deceased had made the same statements to him in relation to his skull having been fractured in childhood, but this testimony was upon objection excluded, and we think, properly. Although there is some conflict in the authorities, the decided weight of them holds that no statements of the insured, made after the issuance of the policy, are receivable in evidence to contradict the written statements contained in his application, where the policy is issued for the benefit of another. The insured in such a case is not a party to the record, has no interest in the policy, and if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases with its issuance, so that there is no legal ground upon which his statements can be received. *Mulliner v. Guardian Ins. Co.*, 1 Thomp. & Cook, 448; s. c., 4 Big. Ins. Rep. 267; *Rawls v. American Ins. Co.*, 27 N. Y. 282; *Fraternal Ins. Co. v. Applegate*, 7 Ohio St. 292; *Washington Ins. Co. v. Haney*, 10 Kans. 525.

[Minor matters omitted.]

There was no abuse of judicial discretion in refusing a continuance.

Judgment affirmed.

NOTE BY THE REPORTER. — The doctrine stated in the last main paragraph of this opinion, as to statements after the issuing of the policy, must be distinguished from that received in regard to prior statements, which is to the contrary. *Swift v. Mass. M. L. Ins. Co.*, 63 N. Y. 186; s. c., 20 Am. Rep. 522; *Dilleher v. Home L. Ins. Co.*, 69 N. Y. 256; s. c., 25 Am. Rep. 182; *Singletm v. St. Louis Ins. Co.*, 66 Mo. 63; s. c., 27 Am. Rep. 321, and note, 327; *Mobile Life Ins. Co. v. Morris*, 3 Lea, 101; s. c., 31 Am. Rep. 631. *Contra*: *Union Cent. Life Ins. Co. v. Cheever*, 36 Ohio St.

In *Rawls v. American Mut. Ins. Co.*, 27 N. Y. 290 (approved in *Swift v. Ins. Co.*, *supra*), it is said: "Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. He was not in any manner the agent of the plaintiff after the issuing of the policy, and so could not bind him."

In *Washington Life Ins. Co. v. Haney*, 10 Kans. 525, it was said: "Can the declarations of a party, whose life is insured for the benefit of another, made long after the application and the contract, be received in evidence against the assured to impeach the truthfulness of the application? The contract is between the assured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference, that the life being active can by its conduct affect the contract even so far as to

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annul it, while the building being inanimate and passive has of itself no such power. But aside from this the rights and liabilities of the parties to the contract are the same. The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not party in interest, as the whole benefit and interest inures to the assured. She is not his agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him. The question was fully examined and settled in the cases of *Rawls v. American Life Ins. Co.*, 36 Barb. 357; s. c., 37 N. Y. 282; *Mutual Life Ins. Co. v. Applegate*, 7 Ohio St. 292. In the case of *Aveson v. Lord Kinnaird*, 6 East, 188, the declarations made intermediate the application and the contract were admitted and in *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225, declarations shortly prior to the applications were received. In both cases, however, they were considered by the courts as being so near the application as to be properly a part of the *res gestæ*, and in the first case Lord ELLENBOROUGH spoke of it as perhaps proper as a sort of cross-examination of the statements made to the medical man. While it may well be doubted whether the reasons given for these two decisions are good, still they in no wise conflict with the well-settled principles upon which the other cases were, and upon which this must be decided."

To the same effect is *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606; s. c., 24 Am. Rep. 344.

DECELL V. LEWENTHAL.

(37 Miss. 331.)

Infancy — necessities — plantation supplies — how questions determined.

An infant, carrying on a plantation, is not liable as for necessities, for supplies and money for the plantation; and boarding with his father, is not thus liable for provisions.*

Whether articles are necessities is a mixed question of law and fact, the court deciding on the fitness, and the jury on the necessity for the articles.

ACTION on account. The opinion states the facts. The plaintiff had judgment below.

A. C. McCain, for appellant.

R. H. Thompson, for appellee.

GEORGE, C. J. The defendant in error sued the plaintiff in error upon an open account for fifty-two dollars and twenty-one cents. On appeal to the Circuit Court, a judgment was rendered against the plaintiff in error for the full amount sued for. Two defenses were set up to the action in the court below. (1) That the plaint

*See *Epperson v. Nugent*, ante, p. 434.

iff below was a merchant, and at the time the goods were sold, had not paid his license-tax, as required by law; (2) that the defendant below was an infant when the goods were purchased.

[Omitting the first ground.]

The plaintiff below, in answer to the plea of infancy, asserted that the articles sold were necessaries. He proved the sale and delivery of the articles, and that they were reasonably worth the prices charged. He also proved that the defendant, during the time he bought the goods, was farming on his own account, and was between eighteen and nineteen years of age, and that "his condition in life was as good as that of any young man in the country." He also proved that the defendant was boarding with his father and paying him board. The defendant then testified, as a witness, that he was a minor, boarding with his father at the time he purchased the goods, and then offered to testify further, that the articles mentioned in the account were not purchased for himself, but for laborers hired by him in the cultivation of a crop. The plaintiff's objection to this testimony was sustained. This evidence should have been admitted. The account sued on contained items of plough points and other agricultural implements, tobacco, cash, bagging and ties, bacon, flour, coffee, locks, hinges, and other items suitable for laborers on a farm. It had been shown by the plaintiff himself that the defendant was engaged in farming at the time the goods were sold. It is well settled that the necessaries for which an infant may bind himself are personal, and do not extend to supplies needed or used by him in trade. Tyler on Inf., § 76; 1 Pars. on Cont. (5th ed.) 313; *Tupper v. Cadwell*, 12 Metc. 559; 1 Story on Cont., § 127; *Grace v. Hale*, 2 Humph. 27; *Turberville v. Whitehouse*, 1 C. & P. 94. In *Grace v. Hale*, *ubi supra*, it was held that a horse was not a necessary to a minor who was engaged in farming. Infants are not considered competent to carry on business of any sort. If they are allowed to trade or farm, and to bind themselves for articles necessary in their occupations, it is not perceived that any thing remains of the protection arising from their minority.

The court erred also in leaving the whole question of necessaries to the discretion of the jury. Necessaries are a mixed question of law and fact. The court determines whether the articles furnished fall within the class of necessaries suitable to any one, infant or adult, in the defendant's situation and condition in life; and if the court decides that they do come within the class, the jury are to

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decide whether the particular articles furnished were actually necessary under the circumstances of the case. Tyler on Inf., § 73, and cases cited. BIBB, C. J., in *Beeler v. Young*, 1 Bibb, 519, lays down the rule thus: "Whether the articles are of those classes for which an infant shall be bound to pay is matter of law to be judged of by the court; if they fall under those general descriptions, then, whether they were actually necessary and suitable to the condition and estate of the infant, and of reasonable prices, must regularly be left to the jury as matter of fact." As matter of law, the court should have decided that the tobacco and cash for cotton-picking were not necessities, and so of the bagging and ties.

It must also be noted that the articles furnished, to come within the class of necessities, must not only be of the kind which are suitable to the infant's situation in life, but must be actually needed by him, by reason of his failure to have the requisite supplies. If the infant is already supplied, the plaintiff cannot recover. It is incumbent on the plaintiff to satisfy himself by due inquiry that the articles which he furnishes are actually suitable in quantity and quality. 1 Story on Cont., § 229. Under the proof made by the plaintiff, that the defendant was boarding with his father, all the provisions charged in the account were shown not to be necessities. The defendant was already supplied.

Judgment reversed, and new trial granted.

TOWN OF MACON V. PATTY.

(57 Miss. 378.)

Constitutional law — municipal corporation — assessment for sidewalks.

A municipal corporation may make assessment on each individual for the paving and repairing of the sidewalk in front of his lot, and within the fire limits require it to be paved with bricks.*

ACTION for cost of a sidewalk. The opinion states the facts. The defendant had judgment below.

* To same effect, *Sands v. City of Richmond* (31 Gratt. 571), 31 Am. Rep. 742; *contra*, *Gridley v. City of Bloomington* (88 Ill. 554), 30 Am. Rep. 566.

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Jarnagin, Bogle & Jarnagin, for plaintiff in error.

Rivas & Rivas and Orr & Sims, for defendant in error.

GEORGE, C. J. The board of mayor and aldermen of the town of Macon passed an ordinance in September, 1873, by which they required every owner or claimant of a lot fronting any public street in said town to make a sidewalk of certain specified dimensions along the whole of his property, and to keep the same in repair, when required to do so by a resolution of the board. The sidewalks within certain defined limits on Jefferson street were required to be of whole brick; all other sidewalks were to be of brick, plank, sand, gravel, or other substance capable of being smooth and hard. It was also provided that "all sidewalks which shall not be put in condition according to the orders of the board, and within the time prescribed, and thereafter kept in repair, are hereby declared nuisances, to be abated as other nuisances." In July, 1878, A. Klaus and J. N. Holman, styling themselves "street committee," addressed a letter to Patty, the defendant in error, in which they notified him to have the sidewalk in front of the residence then occupied as a millinery shop placed in good repair with whole brick immediately; and that if the order was not complied with, the street committee would have the work done at his expense; and they requested an answer as to his intention in respect to complying with the order. Three days after the date of the above letter, Patty replied to it, declining compliance on the following grounds: 1st. That the sidewalk did not belong to him, but was public property, like other portions of the street. 2d. That the sidewalk compared favorably with the best sidewalks in the town. 3d. That the committee had no legal right to issue such order. The street committee thereupon proceeded to have a sidewalk laid, ninety-nine feet in length, in front of the property, at a cost of fifty-two dollars, for which sum the town of Macon brought this action before its mayor, and recovered judgment. By agreement of the parties the cause was taken to the Circuit Court by *certiorari*; and in that court judgment was pronounced, reversing the judgment rendered by the mayor, and dismissing the suit. From this judgment this writ of error is prosecuted.

It is now well settled with no dissenting voice, except in Iowa, that a local assessment requiring each lot-owner on a single street

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or part of a street to improve the street in front of his property at his own expense, would be unconstitutional, because there would be no apportionment of the tax ; and Judge COOLEY says that such a law " would be nakedly an arbitrary command to each lot-owner to construct the street in front of his lot at his own expense, according to a prescribed standard ; and a power to issue such command could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage. But any such idea is clearly inadmissible." Cooley Const. Lim. 508. Burroughs takes the same position. Burroughs on Taxation, 469. And the cases are uniform to the same effect, except in Iowa. That the power of making local assessments for local improvements is not regulated by the provisions of the Constitution of the State, which provide for uniformity and equality in taxation, on an *ad valorem* basis, has been settled by this court in *Daily v. Swope*, 47 Miss. 367, in a learned and elaborate opinion by SIMRALL, C. J. This opinion follows the authorities which sustain such assessments in other States having similar provisions in their Constitutions, and places this right in the taxing power of the legislature. *People v. Mayor of Brooklyn*, 4 N. Y. 419; *In re Washington Avenue*, 69 Penn. St. 352; *Lexington v. McQuillan*, 9 Dana, 513; *Burnes v. Atchison*, 2 Kans. 454; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Burnett v. Sacramento*, 12 Cal. 76, *Yeatman v. Crandall*, 11 La. Ann. 220; *McGehee v. Mathis*, 21 Ark. 40; *Goodrich v. Winchester Turnpike Co.*, 26 Ind. 119; *Scovill v. Cleveland*, 1 Ohio St. 126; *Norfolk v. Ellis*, 26 Gratt. 224. Contra, *Mobile v. Dargan*, 45 Ala. 310. This power is also classed under the law of taxation in Sedgwick on Stat. and Const. Law (2d ed.), 426; 2 Dill. Mun. Corp., ch. 19, § 586; Cooley Const. Lim. 497, 498.

But while these assessments are made under the taxing power, a very wide distinction has been taken between them and taxes for general purposes. On account of this essential difference, the courts have been enabled to reach the conclusions above referred to, that local assessments are not within the terms of constitutional restrictions on the subject of taxation. And this difference is even more clearly recognized in numerous cases which hold that statutory exemptions from taxation do not include exemptions from local assessments. Thus, in *Matter of Mayor of New York*, 11 Johns.

77, it was held that a statute which provided that no church or place of public worship should "be taxed by any law of this State" did not confer an exemption from an assessment to improve the street on which the church assessed was situated. And in *Baltimore v. Greenmount Cemetery*, 7 Md. 517, where the charter of the company provided that a certain number of acres of land "shall be forever appropriated and set apart as a cemetery, which, so long as used as such, shall not be liable to any tax or public imposition whatever," it was held that the exemption applied only to taxes or impositions for the purposes of revenue, and did not prevent the assessment on the cemetery by the municipal authorities of a due proportion of the cost of improving the street on which it was located. See, also, *Merrick v. Amherst*, 12 Allen, 500, and numerous cases cited in Cooley on Taxation, 147, and Burroughs on Taxation, 461. This distinction is so marked that it is held that the grant to a municipal corporation of the simple power to levy taxes does not authorize it to make local assessments for local improvements. 2 Dill. Mun. Corp., § 606, note 3; *Wright v. Chicago*, 20 Ill. 252; *Columbia v. Hunt*, 5 Rich. 550; *Chicago v. Wright*, 32 Ill. 192; *Annapolis v. Harwood*, 32 Md. 471; Cooley on Taxation, 418. This power, therefore, though it is a power of taxation, is a peculiar and special power, and is regulated by considerations distinct from those which regulate the taxing power.

A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the tax payer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole State, or a known political subdivision, as a county or town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality, it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is like a tax, in that it is imposed under an authority derived from the legislature, and is an enforced

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contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax, in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax, in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed, or else the courts will interfere to prevent its enforcement. *Hammett v. Philadelphia*, 65 Penn. St. 146; s. c., 3 Am. Rep. 615. The courts will also interfere to prevent an excessive rate, beyond the cost of the improvement. It is also within the power of the courts to judge whether the object for which it is made is public, and also whether it is so exclusively public as to prevent its imposition on a particular locality.

These differences have not always been borne in mind by courts in discussing the nature and extent of the power of local taxation. There seems to have been a diversity of opinion at first, as to whether the power should be referred to the right of eminent domain or to the power to tax. In *People v. Mayor of Brooklyn*, 6 Barb. 209, the Supreme Court of New York, in an able opinion drawn up by Justice BARCULO, decided that a law authorizing a municipal corporation to make an improvement in a street, and to assess the cost on the property adjacent according to the benefit each lot should receive from the work, was an attempt to take private property for public use, under the power of eminent domain, and held the law unconstitutional because no provision was made for compensation. This case was taken to the Court of Appeals, and the judgment of the Supreme Court reversed. Mr. Justice RUGGLES vindicated the conclusion at which the Court of Appeals arrived in a very learned opinion, in which he denied that the law was an attempt to exercise the right of eminent domain, but was a valid act under the taxing power. 4 N. Y. 419. Having reached this conclusion, he quoted from MARSHALL, C. J., in *Providence Bank v. Billings*, 4 Pet. 514, 563, as follows: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or

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corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused." "But the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." And he further quoted from the same learned judge, in *McCulloch v. Maryland*, 4 Wheat. 316, 428, as follows: "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and the influence of the constituents over their representative, to guard them against its abuse." "And it is unfit for the judicial department to inquire what degree of taxation is the legitimate use and what degree may amount to the abuse of the power."

Under the influence of these doctrines, which were applied by MARSHALL, C. J., to the right of general taxation vested in the legislature of a State to provide a revenue for the public service, the Court of Appeals of New York reached the conclusion that this power of local taxation, being the same thing as the taxing power, was illimitable, with no other restriction than the discretion of the legislature and their responsibility to their constituents. On this point the court said: "The power of taxation, or of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature." These powers "are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation." The court then proceed to define the justice of local taxation imposed

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on those who are to receive the benefits to be derived from the expenditure; but they nowhere intimate that the power to levy the local tax is dependent upon the fact that its expenditure is a real local benefit, but state explicitly that the determination and judgment of the legislature on the subject are conclusive and cannot be revised by the courts. And in *People v. Lawrence*, 41 N. Y. 123, 137, the same court announce the same doctrine, saying that there is no constitutional restraint upon the exercise of this power; that the right of determining what portion of the public burdens, by way of taxation, shall be borne by any individual or class of individuals, must be determined by the legislature; that however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents, and that the judicial department can afford no redress. And to the same effect is *St. Joseph v. O'Donoghue*, 31 Mo. 345.

The courts having reached the conclusion, as before shown, that the restrictions in the various State Constitutions on the power of taxation, requiring taxes to be levied with equality and uniformity and on an *ad valorem* basis, did not apply to local assessments, this power was thus left practically without limit. The tax payer was even deprived of that protection, stated by MARSHALL, C. J., to be the only safeguard against oppressive and unjust taxation, the accountability of the body levying the taxes to its constituents; for it is at once perceived that a legislature levying an imposition on a small district, in many instances not including a dozen tax-payers, were not under the ordinary influence exercised by constituents on their representatives. The tax payer was in effect left, in the language of ROBERTSON, C. J., in *Lexington v. McQuillan*, 9 Dana, 513, to "spoliation by a dominant faction, or by a rapacious public power, acting in obedience to a constituent body, for whose use his property may be taken, and from whom no similar contribution is required." It is true, it was said that the tax was for the benefit of the person who paid it; that he received a full equivalent for the money exacted from him in the enhanced value of his estate; and that though the object was so far public as to justify the interposition of the legislature in levying a tax, yet the benefit was private and individual, and ought therefore to be borne by those who received the advantage of the expenditure. But under the view which the courts had taken, the legislature was the exclusive

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judge, and in the plenitude of its power, could determine that the object was so far public as to authorize the imposition of the tax, and so far private as to authorize the assessment to be made on private persons on account of the benefits to be conferred by it, and could also judge of the necessity for and the extent of the improvement to be made. This inconsistency was strongly put by the Supreme Court of Wisconsin, in *Weeks v. Milwaukee*, 10 Wis. 242, 259. That court, in speaking of the improvement of a public street by local assessment, said: "In sustaining these assessments when private property was wanted for a street, it has been said the State could take it, because the use of a street was a public use; in order to justify a resort to the power of taxation, it is said the building of a street is a public purpose. But then having got the land to build it on, and the power to tax, by holding it a public purpose, they immediately abandon that idea, and say that it is a private benefit, and make the owner of the lot build the whole of it." And the court reached the conclusion that the power to make local assessments, though a part of the taxing power, yet was special and peculiar, and was conferred on the legislature only, in virtue of a clause in the State Constitution recognizing the power of "assessment" as distinct from the power of taxation.

As the dangerous nature of the power began to be more and more recognized, when considered as a taxing power only, and therefore virtually without restriction, unless imposed by the Constitution, and as the courts had held that it was not within the constitutional restriction in reference to the taxing power, the judicial mind, giving more importance to those peculiarities which distinguished it from the taxing power pure and simple, began to discover restrictions and limitations arising from its nature and characteristics, as well as from the nature and characteristics of the taxing power in general. In *Lexington v. McQuillan*, 9 Dana, 513, the city ordinance authorized the charge of paving a street in front of each lot to be levied on that lot alone, without reference to whether there would be inequalities in the cost, arising from a difference in the difficulties of doing the work in front of the several lots. There was no effort to apportion the cost of the whole improvement among the several lots, but each lot was made to bear the whole burden of the improvement in its front. This assessment was attempted to be defended upon the ground of the unlimited taxing power of the legislature.

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But the court said that the doctrine that the taxing power in this country is altogether arbitrary is alarming; that it was limited by some of the declared ends and principles of the fundamental law; that among these are equality as far as practicable, and security of property; that though exact equalization is unattainable and Utopian, there are well-defined limits within which practical equality may be preserved, and which should be deemed impassable barriers to legislative power; that though taxation may not be universal, it must be general and uniform; that the legislature cannot exact from one citizen, or one county, the whole revenue of the commonwealth, for that would be taking private property for public use without compensation; that whenever the property of the citizen is taken and appropriated, without his consent, to the public benefit, the exaction is not a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property; that taxation and representation go together, and therefore when taxes are levied they must be imposed on the public, in whose name and for whose benefit they are required, and to whom those who impose them are responsible; that the citizen's property should not be taken by the public without his consent, or an equivalent in money, or in similar contributions by itself; that the legislature may make local taxing districts, composed of streets or parts of streets, for the improvement of these highways; that when this is done, each district must be regarded as a separate municipality in itself, with power to act for itself as to the improvement for which it was created; that this authority was duly conferred by the charter of Lexington in requiring the assent of a majority of the property-holders in the district to the improvement and assessment, or, in lieu of this, by requiring the unanimous consent of the city council, which necessarily included the consent of the member representing the ward of which the sub-district assessed was a part. The court admit, that there would probably be no reasonable objection to an ordinance requiring each lot in the city to bear the expense of the improvement in front of it, if it was required to be done in the same fiscal year; but assert that one citizen cannot be compelled to pave any one street for any one year, or at any one time, upon the ground that other streets or portions of streets would thereafter be required to be paved in the same manner, and thus a like burden would fall on other citizens

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exclusively ; for such a prospective and contingent equalization of contribution to the public use would be too remote and uncertain to have the effect of equalization. And by this reasoning the court reached the conclusion that the ordinance was invalid for want of the apportionment necessary in taxation. In accordance with this decision, the courts everywhere, except in Iowa, hold that a local assessment, requiring each lot-owner on a single street to improve the part of the street on which his property fronts, at his own expense, is unconstitutional ; and Judge COOLEY says, as already quoted, that such a law would be an arbitrary command, inconsistent with a constitutional government. Cooley Const. Lim. 508. Some of the other doctrines, so ably announced in this case, have not received the same universal recognition.

The courts of New Jersey also reached conclusions very materially restricting the power of the legislature as to local assessments. In that State, the courts deduced not only the power from the actual benefit conferred on the tax payer, but measured the reach of the power by a judicial ascertainment of the extent of that benefit. The courts there hold that the legislature cannot judge of the extent of the benefit, and cannot apportion the tax, except in proportion to the benefits conferred ; and that if the benefits conferred do not equal the cost of the improvement, the excess of cost must be paid by the public. They reached that conclusion by this reasoning, that the justification for the assessment is that the lands upon which it is imposed receive a peculiar and exceptive benefit from the improvement ; that the reception of such benefit prevents the assessment from being a taking of private property for the public use ; that this principle is not applicable except when the benefit is commensurate with, or superior to, the burdens, for if the sum exacted exceed the benefit, as to that excess there must be a taking of private property for the public use, since the consideration of this excess over the benefit must be the public use in virtue of which the legislature alone had power to interfere. *Tidewater Co. v. Carter*, 18 N. J. Eq. 518 ; *State v. Newark*, 27 N. J. 185 ; id. 37 ; id. 415 ; *State v. Jersey City*, 37 id. 128 ; *State v. Hoboken*, 36 id. 291.

In Pennsylvania, similar though not identical conclusions were reached by reasoning in substance the same. *In re Washington Avenue*, 69 Penn. St. 352. The Supreme Court there held that the assessment was only justifiable on account of the exceptive benefit to the tax payer to be conferred by its expenditure ; that

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though the legislature may make the apportionment by the front foot measurement in cities and large towns, and where the density of the population along the street and the small size of the lots make it a reasonably certain mode of arriving at a just equalization of the burden, according to benefits, yet this mode is but a substitute for an actual assessment by sworn jurors or assessors, and is allowable only because it practically arrives at a correct result in adjusting the burden according to the benefits. And in that case the court held, that the principle of the per foot assessment was inapplicable to the making of a public highway outside of a city or town ; and it further referred the question of benefits to a master, who reported that the improvement was a general public benefit, and not of peculiar and exceptive advantage to the persons on whom the assessment was made ; and on this finding by the master the court held it was incompetent for the legislature to impose a local assessment on property within one mile of the highway. And the court said, quoting from Judge SHARSWOOD, in *Hammett v. Philadelphia*, 65 Penn. St. 146, 157 ; s. c., 3 Am. Rep. 615, “ Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be imposed where the improvement is either expressed or appears to be for general public benefit.” In that case, the court admit that the power to tax is unbounded by any express limit in the Constitution of Pennsylvania ; and held that the provisions in the Bill of Rights declaring that acquiring, possessing, and protecting property, were inherent and indispensable rights ; that other provisions, securing the people in their possessions from unreasonable seizures, prohibiting any person from being deprived of his property unless by the judgment of his peers or the law of the land, prohibiting the taking of private property for public use without just compensation, and securing to every man, for an injury done to his lands and goods, remedy by due course of law, and the administration of justice without sale, denial or delay, and prohibiting the impairing of contracts,—stamp upon property an inviolability which cannot be frittered away by verbal criticism on each separate clause, thereby breaking “ the united fagot, stick by stick,” until the strength of the whole is gone. And the court then declared that taxation is bounded in its exercise by its own nature, essential characteristics and purposes ; and it must therefore visit all alike in a reasonably

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practical way, of which the legislation may judge, but within the just limits of what is taxation ; that it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction ; to do this would be confiscation, not taxation, extortion, not assessment, and would fall within the clearly implied restrictions in the Bill of Rights, that laws which cast the burdens of the public on a few individuals, no matter what the pretense, or how seeming their analogy to constitutional enactments, are in their nature despotic and tyrannical, and to prevent their enforcement the judiciary must interfere.

This case was founded on the case of *Hammett v. Philadelphia, ubi supra*, which announces the same doctrines. In the last case, the court said that an assessment upon an individual or a class for a general and not a mere local purpose, whether regarded as an act of confiscation, a judicial sentence or rescript, or a taking of private property for public use without compensation, equally transcends the legislative power ; that whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is *pro tanto* a taking of private property for public use without compensation. And the court declare it to be the solemn duty of the judiciary "to guard and protect this right of property as well from indirect attacks under any specious pretext, as from open and palpable invasion." The Supreme Court of Illinois took a view similar to that of the courts of New Jersey. *Chicago v. Larned*, 34 Ill. 203; *Lee v. Ruggles*, 62 id. 427.

In tracing thus far the decisions in some of the most important States of the Union, on the subject of local assessments, we have seen the gradual rise of a revisory power of the courts over these public impositions, which has not been extended to taxation pure and simple ; and we have also seen the recognition of the wide differences between the practical operation of the two powers. Proceeding upon the idea that the local assessment was no burden, because the benefits to be derived from the improvement were equal to the cost, another conclusion was reached, which we will now proceed to notice.

At first these local assessments were so insignificant in amount, as compared with the value of the property on which they were levied, that the right to have, as a remedy for their collection, a personal judgment against the owner was not challenged, and there

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are many instances in which such judgments were rendered. At length the spirit of speculation in town and city lots induced a pushing of street improvements far beyond the immediate necessities for them in the hope that the progressive enterprise and rapid growth of the towns and cities in which they were made would soon overtake them, and amply repay the costs in the enhanced value of the lots in the neighborhood. In many instances, these hopes were not realized and the cost of making expensive improvements on newly opened streets, which were but sparsely settled, was found to be so great as to induce a surrender of the property assessed; but contractors for the improvements, to whom the assessments were assigned as their means of compensation, were unwilling to accept the property thus enhanced in value by the improvements for the cost of making them, and after having exhausted this property, sought to collect the unpaid balance from the general estate of the owner. These attempts were resisted in the courts, and caused a more careful inquiry into the nature of these assessments. The conclusion was reached in California and Missouri, that it was not within the power of the legislature to make these assessments a charge beyond the property on which they were made. *Taylor v. Palmer*, 31 Cal. 240; *St. Louis v. Allen*, 53 Mo. 45. We agree that the result reached is correct; but a logical conclusion from the grounds upon which these assessments were justified would have been to confine the remedy to the increased value of the estate, caused by the improvement. For it was said in Missouri, in *Garrett v. St. Louis*, 25 Mo. 505, that the assessment was a tax, not on the property directly, but on the benefits to be conferred by the improvement. Judge SHARSWOOD, in *Hammett v. Philadelphia*, *ubi supra*, said: "Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is *pro tanto* a taking of his private property for public use without any provision for compensation." And the assessment was universally justified upon the ground that it was in fact no real charge or burden, because the owner who paid it was fully indemnified by the enhanced value of his property. It is not perceived that the wrong of imposing a burden on a man's property, on the ground that it is enhanced in value at least to the extent of the burden, and then selling the property thus enhanced to discharge the burden, whereby the owner loses his property through an obtrusive and uninvited effort on the part of the public to benefit

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him, differs, except in degree, from the injustice of a proceeding in which to this same wrong is superadded the duty of paying a balance that may be due after exhausting the property supposed to be benefited. If the problem is to be worked out on the idea that the assessment is no burden, because the benefit will be equivalent to it, then, in case of the inability of the owner to pay for the boon conferred on him, the remedy of the benefactor should be limited, to the taking of so much of the estate as will represent the increased value imparted to it by his efforts.

But this theory rests on a false foundation, though the conclusion is just. The assessment is a burden and an exaction in behalf of the public. It is made for a public use. Public authority to enforce it can be justified on no other ground. Power does not exist in a constitutional government to compel a person to improve his estate for his own private benefit. This theory cannot receive the sanction of this court, for the reason that it is grounded on a violation of that clause of the Constitution which declares that "private property shall not be taken for public use, except upon due compensation first being made to the owner or owners thereof, in a manner to be provided for by law." In *Brown v. Beatty*, 34 Miss. 227, the High Court of Errors and Appeals of this State rightly decided that this compensation could not be made in estimated benefits thereafter to accrue from an improvement thereafter also to be made. The compensation must precede, not follow, the taking, and hence could not be affected by any thing that was to be done afterward.

We must apply this provision in all cases, notwithstanding it has been said that it is only applicable to property taken under the right of eminent domain, which right does not extend to the taking of money. We agree that the most important use of this provision is to restrain the right of eminent domain; but that is not its whole force. For the prohibition is general and absolute: "Private property shall not be taken for public use, except upon due compensation," is the language of the Constitution. The prohibition is not as to the methods in which the appropriation may be made, but is a denial of the power to make it at all by any method, under any circumstances, and under any pretense whatever, unless compensation is first made. It was intended to secure the absolute inviolability of private property of all kinds against any and all invasions under public authority. If the right of eminent domain does

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not extend to the taking of money, this is no reason why that kind of property should not come within the protection of this clause of the Constitution; but on the contrary, the absence of the right is but an additional safeguard for its protection. It is true that money exacted from the citizen, in the way of lawful and constitutional taxation, is not within the meaning of this clause because it is taken in discharge of a debt to the State or public. But if under the guise of taxation money is attempted to be exacted beyond the limits of the taxing power, it is a violation of the security afforded by this clause of the Constitution. Chief Justice MARSHALL, of Kentucky, in *Cheaney v. Hooser*, 9 B. Monr. 330, 341, said, "There being no express constitutional declaration or prohibition applicable to the power or subject of taxation, and none which in terms secures equality or uniformity in the distribution of public burdens, either general or local, there is no clause to which the citizen can with certainty appeal for protection against an oppressive and ruinous discrimination under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation." "This is the great conservative principle of the Constitution, by which the rights of private property are to be preserved from violation by public authority; and we shall feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object."

It is said, however (and that view is pressed with great force and plausibility in *People v. Brooklyn*, 4 N. Y. 419, heretofore commented on), that local assessments cannot be drawn within the purview of this clause of the Constitution, because taxation operates upon a community, and by some rule of apportionment; and the exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals. The distinction is a just one, but we cannot perceive that it has the force ascribed to it. The force of the argument, as we understand it, is, that a local assessment, because levied on a community and not on a single individual, cannot be made under the power of eminent domain, and therefore is not within the protection of this clause of the Constitution. If it be a valid local assessment, the conclusion is just; but the argument cannot be made to sustain the validity of the assessment itself, if that be the thing in question, unless we concede

that every taking of private property not under the right of eminent domain must be a valid act, if only several — a local community, instead of an individual, be the victim. This argument prevents individual acts of spoliation, but licenses a general pillage, and converts single acts of lawlessness into valid exercise of lawful authority, by the simple process of repetition. *In re Washington Avenue*, 69 Penn. St. 352; *Hammett v. Philadelphia*, 65 id. 146; s. c., 3 Am. Rep. 615.

Since then it appears, that under the Constitution of this State, private property cannot be taken for the public use, under the plea that due compensation is made by benefits arising from the appropriation; and since it has also been shown that the taxing power may be limited and controlled by what Judge MARSHALL, in the passage heretofore quoted, called the great conservative principle of the Constitution — the provision prohibiting the taking of private property for public use without due compensation — it follows that the power to make local assessments in this State does not exist, if there be no other foundation for it than the equalization of the burdens with the benefits to arise from the local improvement.

We believe the power exists: it has been recognized as an existing power in the State by the public, the legislature, and by at least three decisions of this court. It may be difficult, perhaps impossible, to trace it to its proper source, and square its operations by logical rules, derived from a consideration of it as one of the precisely defined powers of the Constitution. It had its origin and development in the principle of local self-government, characteristic of free institutions, founded by the Anglo-Saxon race — the leaving to each local community the due administration of the affairs in which it had an exceptive, peculiar and local interest, and in the nature of real property, to which it is alone applicable. It is not the creation of a philosophical brain drafting constitutions and forms of government, but the outgrowth of the necessities and varying exigencies of local communities, and hence, like all institutions of similar origin and development, has inconsistencies and incongruities. Its practical operation, so as to prevent injustice, depends largely upon the good sense and the capacities of the Anglo-Saxon race for the successful working of free government and the management of their private affairs. It combines the public interest with the administration of individual property. Chief Justice SHAW, in *Wright v. Boston*, 9 Cush. 233, 241, said the prin-

ciple of local assessment is "that when certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may be justly made, providing that under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden." And the Supreme Court of Maryland, in *Baltimore v. Greenmount Cemetery*, 7 Md. 517, spoke of assessments for paving streets as charges on property which are "inseparably incident to its location in regard to other property."

These extracts give the true meaning of local assessments, and furnish the ground upon which they rest and the principle by which they are to be regulated. These assessments, as has been seen, apply only to land, and are a charge on land only. Land is incapable of that absolute and exclusive private dominion accorded to other property. The world's business could not be transacted for a single day without the legal recognition of rights and easements in land, independent of its private ownership. The source of all title to it is the sovereign in whose jurisdiction it exists, and this sovereign has the power to resume title to any portion of it needed for the public use, upon payment of compensation in other property. It is immovably fixed in its location and relations with other land. No one tract, however large, is capable of beneficial enjoyment, without some right or privilege of user in other land. Without such reciprocal rights, each owner of land would be a prisoner in his own home, and the ideal boundaries of separate estates would be insuperable barriers to all human intercourse and progress. There are essential improvements which cannot be made on one tract without affecting another. These relate especially to drainage, protection from inundation, and free passage and intercourse. These improvements sometimes become of public importance, as well as indispensable to the proper enjoyment of each separate tract. In such cases society has arranged for such management of these common, public, and private interests, as would be just and equitable; and to prevent the burden of such improvements from falling only on the liberal and public-spirited, has provided for its equitable division among those interested. Such a regulation is a local assessment. Towns and cities exist for the more convenient intercourse between their inhabitants and the outside world who resort to them. Without this, there would be no reason for building them. In them, land is principally devoted to

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three uses—locations for stores, shops, and factories; dwelling-places for the inhabitants and visitors; and streets, alleys and avenues, over which there may be convenient and free access to all persons, from all points to all other points. Without these, no business could be carried on; the customer and the merchant and manufacturer could not meet; the citizen could not go from his dwelling to his place of business. There is not a day in the year in which nearly every citizen does not use these highways either for business or pleasure. They must permeate every part of the city, and must lead to every man's door. A break or obstruction in any part of one of them would destroy its usefulness and result in the greatest inconvenience. They may be of various qualities, from the common dirt road to expensive pavements of stone or wood. They are essential both to the public at large and to the inhabitants who dwell or do business on them. Each street has thus a public and a local use. In a large city all the streets are rarely if ever used by the same person or by the same local public or neighborhood; hence the injustice of improving any one street at the public expense, unless the municipality should undertake to improve all alike, and in the same year, without reference to the peculiar needs of each locality. Each lot-owner has therefore a general interest in the improvement of all, and a peculiar and special interest in the improvement of the highway on which his property is located. To leave it to the voluntary action of all would result either in no improvement or the imposition of the burden on a few, when many who derive equal benefits would go free. Hence the necessity for a just and equitable regulation by which each should be compelled to do his share.

It has been seen that in the improvement there is both a general and a local interest. To accomplish the desired result, there must be the conjoint action of those who represent each. The city council may be justly regarded as the representative of the public interest, and may therefore judge of the public necessity for the improvement, and put in operation the public powers necessary to do the work on some equitable plan. But it is not the sole judge, nor does it represent the sole interest to be affected, where the contribution of the local public or sub-district is required. As the representatives of the whole municipality, the council can do the work at the public expense. But is it authorized of its own will to impose the whole expense on the property in the locality improved?

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In most of the States, notwithstanding the doctrine which prevails that the assessment is no burden, but is remunerated by the enhanced value of the property, it is common to require the assent of the property-holder, on whom it is imposed, or a majority of them. ROBERTSON, C. J., as we have seen, deemed this assent, given either directly or through their representatives, essential. Under our Constitution, where the taking of private property cannot be recompensed by the supposed public benefits to be derived from the appropriation of it, it would seem to be proper that the consent of the owner, or of a majority in a local district established for the improvement, should be obtained. We have seen that the assessment is lawful in virtue of there being a common interest between the property-holders as individuals, and an interest common between them as a locality on the one hand, and the rest of the public on the other, which justifies an equitable rule for the management of these interests. This management cannot be intrusted to one of the parties alone; the interest which justifies it is common, and the management should likewise be common. To give the sole direction and management to the city council would be to intrust them as the representatives of a public upon whom the whole duty might lawfully be devolved, and therefore, having a direct interest to exempt their constituents from a burden by placing it on others, it would be making them the sole judges in a matter in which they were directly interested. This should not be done. It would violate the essential principles of a free government; it would turn over the property-holders to the unrestrained power of a public agency not responsible to them, and accountable only to a constituency who are interested in making the exaction for their own benefit.

Speaking for myself only, I regard it, therefore, as essential to the validity of a local assessment for a public improvement, in the use of which the general public are directly interested, and when the district on which the levy is made is less than any of the regular and legal political subdivisions of the State, that the assent of the local district should be obtained.

Other considerations apply, where the local district, as our levee district, is composed of one or more counties, and entitled therefore to direct representation in the legislature, and where, also, the general public has no user of the improvement. As to the property-owners in such a district, it cannot be said that the principle of

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taxation without representation has been violated; but, as to the smaller districts above alluded to, there is no pretense of representation, unless we adopt as valid the argument by which Sir James Mariott undertook to convince the British Parliament that the thirteen Colonies were represented in that body, in virtue of the representation of the county of Kent, of which, by a legal fiction, they were deemed a part. See Cooley's Const. Lim. 60, note. But the right to be consulted is stronger in case of an assessment on a locality less than any political division of the State for an improvement in which the public has a direct interest and right of user than in case of the mere levy of a tax pure and simple. The excuse for the imposition is that the improvement is a private benefit to each owner. We have seen that this private benefit cannot, under our Constitution, be treated as a compensation for the money exacted, as it is in other States. It is also certain that no power exists to compel the owner of an estate to improve it for his own private benefit against his own consent. Such an order, issuing from any public authority to an individual, would be an act of imperial, autocratic power, not the exercise of any function of a free government. If such an order cannot be given, as is now universally conceded, to one individual, can it be given to two or three or a dozen — a number smaller than the State recognizes as a distinct public, having political rights and duties, in any case whatever? Can the legislature create such a local subdivision, with no power of self-defense, through representation, and endow it with no capacity whatever, except to be the bearer of a burden imposed on it without its consent? The Supreme Court of New Jersey in *State v. Newark*, 37 N. J. 415, although recognizing the doctrine that the tax may be compensated by the enhanced value of the land, say, that "when such a burden is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the line which is the boundary between acts of taxation and acts of confiscation." Have we not crossed that line when, without the consent of the owner, we make such an assessment under a Constitution which refuses to recognize compensation in the improved value of the land?

It is said that the legislature may impose this burden without the consent of the local district, and therefore may delegate the power to a municipal council. But, if this power of the legislature were conceded, it by no means follows that it may be delegated as claimed.

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It will not be denied that the legislature cannot delegate the power to one municipality to levy an assessment on another, though such power might be exercised by the legislature itself. The only power of taxation or assessment which the legislature may delegate is a power to a local community to tax itself, not another. For all the purposes of the assessment, the district in which it is laid is as distinct from the municipality in which it is situated as if it were outside of its limits. By the mere fact of its creation, it is made separate and distinct from the rest of the municipality. It is not only separate and distinct, but its interest, so far as the assessment is concerned, is antagonistic to the interest of the municipality which assumes to make it. That the distinction may be plainly seen between the case of a local assessment on such a district imposed by the will of another district and our levee system, we have but to imagine that the whole territory included in the levee districts is embraced in one county, and that the legislature has empowered the supervisors of that county to build the levee by a tax levied on the general public of the county, or by a local assessment only on the lands exclusively fronting on the Mississippi river, whereby the sole expense of protecting all the lands in the county from inundation may be imposed on a small body of proprietors, created into a taxing district at the discretion of a power interested in relieving its constituents from a great burden, by shifting it on a smaller number, who are incapable of protecting themselves. The Supreme Court of Kentucky said in the case of *Lexington v. McQuillan*, *ubi supra*, that when taxes are levied, "they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible," and that the citizen's property is not to be taken by the public "without his consent, or an equivalent in money, or in similar contributions by itself." And Judge COOLEY, speaking of local taxation under compulsion, and the maxim that taxation and representation should go together, says, that "any reliance upon responsibility to constituents, as a check upon extravagant taxation and reckless misappropriation, becomes useless, and indeed worse than useless, because deceptive, if the constituency in general, instead of bearing the burden of evil legislation, may actually, in some cases, have the general burden diminished by the selection of particular communities for exceptional and invidious taxation. And any principle in representative government may well be considered obsolete when, as

applied, it only removes the substantial responsibility and restraining power from the constituency concerned to a distant central authority." Cooley on Taxation, 495.

The above reasoning applies to local assessments, so far as relates to streets, to make a single improvement, which are not of themselves a part of a system which has already been applied or is then applied to the whole municipality, and to such as are exceptional in character and expense as compared with the burdens imposed on the rest of the community. It will be at once perceived that if all the streets in a town are required by the same ordinance to be paved, and that the property-holders of each street are to pay the cost of paving their own street, the burden is so equalized that we must regard it as but a method of levying a tax on the whole town ; and the same result would follow if a large part of the town had been improved by local assessments on the several streets which had been acquiesced in, and a similar ordinance for repaving the remainder would steer clear of the difficulties we have mentioned. It is only when the State or a municipality selects a part of the streets to be improved in this way, or selects a part to be improved in a manner exceptionally expensive, as compared with the rest of the community, that the persons upon whom the burden is cast should have a right to be consulted. In *Howell v. Bristol*, 8 Bush, 493, the Supreme Court of Kentucky said: "A law imposing taxation on the general public, the evident intent and legitimate result of which are to equalize the burden so far as practicable, will not be held as violative of the fundamental law merely because that desirable end may not be attained. But when, as in this case, the most probable, if not the necessary, consequence of the law is to produce the most oppressive inequality, and to compel a small minority of tax payers to provide at their sole expense an improvement of general utility and public interest, the construction of which costs more than double as much as the character of such improvements in general use, and from which, when constructed, the general public derives almost as much advantage as themselves, it assumes the character of an attempted exercise of arbitrary power over the property of this minority ; it becomes, in the constitutional sense, a taking and appropriation of their private property to the public use without compensation." This requirement, that the consent of the property-holders of the district, or a majority of them, should in some manner be given to the imposition of the burden, is not

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found in the adjudged cases, except in the Kentucky case, noted above, nor do my associates concur with me in deeming it essential. It seems to me to result logically from the premises upon which the validity of these assessments must be rested in this State. A determination of the point is not necessary to the decision of the case before us.

We conclude, therefore, that it is now established that these local assessments are not within the unrestricted discretion of the legislature; that they are subject to many and just limitations which the courts will enforce; and that among them is, that the assessment cannot be imposed on an individual alone, but must be apportioned among a sub-district of several. If this were a local assessment, it would be void for the reasons above stated. The improvement however is the repair of a sidewalk, not of a street; and it seems to be well settled that the paving and repairing of a sidewalk in front of the owner's property may be imposed on him as a police duty. Burroughs on Taxation, 494, and cases there cited; Cooley on Taxation, 398, and cases cited.

The police power is incapable of exact definition and of a precise limitation. It seems to be a power to which are referred all governmental acts which are incapable of arrangement under any other distinct head, and which are at the same time justifiable, as internal regulations having in view facility of intercourse between citizen and citizen, the preservation of good order, good manners and morals, and the health of the public. When a duty is imposed, under this power, on a property-holder, no attention is paid to the fact that its performance will confer any exceptive benefit on his property, as in cases of local assessments. On the contrary, this power justifies the exaction from him of that which will lessen the value of his estate by depriving him of what would, under other circumstances, be a lawful use and enjoyment of his property; as where it prevents his carrying on a lawful business in his house, situated in a crowded district, because such business is, under the peculiar circumstances, a nuisance; and also where it prevents the erection on his property of a house of wood or other inflammable material, as a precaution against fire. Under this power is imposed on the owner of urban property the duty of keeping his grounds and vaults clean, and the removal of all causes for the generation or spread of disease. This power, as to active duties required under it, has usually been confined to acts to be performed on property in

the use and occupancy of the party upon whom they are imposed, and such imposition has been on account of such occupancy. The power imposes also a personal duty on account of the relation which the person from whom the requisition is made bears to the property, with reference to which the duty is to be performed.

In *Goddard, Petitioner*, 16 Pick. 504, Chief Justice SHAW placed the validity of an ordinance of the city of Boston, requiring all occupants of houses abutting on streets to clear the sidewalk in front of their houses from snow within a certain number of hours after it fell, upon these grounds: 1. That the duty was salutary and advantageous in a large city, and was imposed on those who could, with little expense, most easily and promptly perform it. 2. That the selection of these persons to perform this duty was not arbitrary, as it would have been if it had been imposed on the merchants or mechanics of the city, between whose convenience and accommodation and the labor to be performed, there was no natural relation; but the imposition was on those who could easily and conveniently perform it, and who commonly derive a peculiar benefit from the performance. 3. That the owner of a lot abutting on a street had a peculiar interest in the sidewalk in front of his property; that though it was subjected to a public easement, he had a peculiar use in it, often in accommodating his cellar door and steps, furnishing a passage for fuel, and a passage also from his house to the street. Upon this case most of the subsequent cases are founded, which hold that the duty to pave and keep in repair a sidewalk may under the police power be lawfully imposed on the owner of the abutting property. Regarding such imposition as made under the police power, Mr. Burroughs, in his work on Taxation, p. 494, says, "As a general rule it is believed that in such cases the duty consists either in keeping the walk in repair, or in constructing a footway of plank, or some similar material not very expensive, and not in constructing permanent and expensive pavements."

The police power in such cases, having reference only to the health and convenient intercourse of the citizens and general public, it would seem, ought not to be exerted to impose a burden not necessary to the end proposed. The lot-owner, when ordered to make or repair his sidewalk, it would appear, has fully complied with his duty when he has used such material as makes the walk dry as a requisite for health, and smooth and firm for the easy and

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convenient passage of the public. There would be an exception in cities which have adopted regulations to prevent the spread of fires, as to such parts of them as are within the fire limits. There the requirement of the use of non-inflammable materials can be justified. And there would be a further exception in those cases, now common in large cities, where the lot-owner has extended his cellar under the sidewalk, or so far encroached on it as to bring into operation another part of the police power which makes regulations for the safety of the public. In such cases the municipal authorities would have the power to prescribe such a superstructure over the cellar or other underlying encroachment as would be permanent and strong enough to insure the safety of the public in using it. In parts of cities and towns where a great number of persons pass, the power would also extend to prevent the use of a material which would occasion a great noise from such constant and crowded use. But this power ought not to be extended beyond the just limits for which it is granted, and should not be made subservient to the imposition of burdens for improvements useful only for the adornment of the public streets.

It must be remembered, however, that sidewalks are also a part of the public streets, and as such may be brought within the principle of local assessments for paving and repairs, just as the carriage-way portions of the streets of which they are a part. And when the municipality chooses to make and repair them in that way, the same considerations, both as to the exaction and the extent of the improvement, apply, as in case of improvements of the carriage-way portion of the streets. It is only when the municipal authorities disregard the principle of local assessments and impose on the owners the duty of paving and keeping in repair the sidewalk in front of their lots respectively, that the police power is exercised. When, however, it is exercised, it ought to be within the limits above stated. It is not necessary to decide whether the municipality may prescribe pavement with brick, as it does not appear but that there were fire limits in the town, and that this pavement was within them. The above views are given as the general principles which should regulate the exercise of this power, with no intent to decide absolutely that the town council cannot, under any other circumstances than those mentioned, prescribe the material to be used. In this case the repairing was done expressly under the police power. A sidewalk out of repair was declared by an

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ordinance to be a nuisance, and the town, on the idea contained in *Mayor v. Maberry*, 6 Humph. 368, proceeded to remove the nuisance by making ninety-nine feet of new pavement out of whole brick, on the failure of the owner to repair.

But there is an insuperable objection to maintaining the suit. The right to decide that the sidewalk is out of repair was not vested in the two street committeemen. This question was solely for the determination of the board of mayor and aldermen, and the power to do it could not be delegated by them. *Hydes v. Joyes*, 4 Bush, 464; *Bryan v. Chicago*, 60 Ill. 507. In the last case the point was expressly ruled.

The judgment of the court below, reversing the judgment of the mayor and dismissing the proceeding in which it was rendered, is

Affirmed.

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(37 Miss. 474.)

Evidence — res gestæ — declarations of deceased.

The declarations of one who has been poisoned, as to his present symptoms, are competent, but otherwise of his declarations as to what he had drunk an hour before. (See note, p. 479.)

CONVICTION of murder. The opinion states the case.

Houston & Reynolds and *F. M. Rogers*, for plaintiff in error.

T. C. Catchings, attorney-general, for State.

CHALMERS, J. The plaintiff in error has been convicted of the murder of his wife by poisoning, and sentenced to be hanged. The principal error of law assigned as ground for reversal of the judgment arises upon the competency of certain statements made by the wife, which were admitted as part of the *res gestæ*. About eight o'clock in the morning, the wife, who had been up to that time in good health, was discovered in her room, suffering intensely and vomiting violently. The alarm was at once given, and the husband

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who was in his field at work, was summoned. Upon reaching the house, he was observed to empty a tin bucket of the coffee contained in it, and fill it with water. The wife continuing to grow worse, the manager of the plantation upon which the parties were laborers was sent to for medicines and assistance. He came with medicine, which he administered to the sick woman. In response to his inquiries as to her feeling and symptoms, she said that she felt as if she was on fire inside, and being asked what she had eaten, replied nothing, except some bread and coffee at breakfast. She died the next day, and a subsequent analysis of some minute particles which clung to the sides of the coffee-pot, which the plaintiff in error had first emptied and then filled with water, developed arsenic in considerable quantities.

It is conceded that the answer of the woman as to her feelings and symptoms as embodied in the declaration — that she felt as if on fire inside — were admissible in evidence, but it is insisted that her statement as to having drunk the coffee was not. We think the objection is well taken, and that the two answers served well to illustrate the true test to be applied in determining the admissibility of this class of evidence. The groans, exclamations, or statements of a sick or injured person, expressive or explanatory of his then present feelings or symptoms, whether made to a physician or other person, are receivable in evidence, because they are regarded as illustrative of the symptoms; and where the symptoms constitute the fact to be determined, the exclamations and explanations uttered while they are suffered are properly treated as a part of the *res gestæ*. It being competent for the State, in determining whether the deceased came to her death in this case by poisoning, to prove by those who attended her the symptoms which she exhibited during her sickness, it was admissible to prove her statements and expressions relative to those symptoms, made and uttered while they were being endured. *Fondren v. Durfee*, 39 Miss. 324. But if the statements are narrative in form, relate to the past rather than the present, and detail the causes which have produced the symptoms rather than the symptoms themselves, they are inadmissible, whether made to a physician or to a non-professional attendant. *Grangers' Ins. Co. v. Brown*, ante, 308, and authorities cited; *Denton v. State*, 1 Swan, 279. So also words spoken by either party during a combat are admissible as parts of the *res gestæ*, because they serve to illustrate their acts, and being simultaneous in point

of time, they become in truth a part of the acts; but when the combat has ceased, and the parties have withdrawn from the presence of each other, the account which one may give of what occurred during the encounter is not admissible in evidence against the other. Slight departures have sometimes been made from this rule, and statements, neither simultaneous nor contemporaneous with the principal event, have been admitted as part of the *res gestæ*. Thus in *Thompson v. Trevanion*, Skin. 402, which was an action for injuries to the wife of the plaintiff, the court "allowed that what the wife said immediately upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage might be given in evidence." So in *Rex v. Foster*, 6 C. & P. 325, a man who had been run over by a cab was heard to groan, by one who was standing near by, but not looking in that direction. The bystander ran to him and asked him what was the matter, and the reply made was admitted in evidence in a prosecution of the driver of the cab. In *Commonwealth v. M'Pike*, 3 Cush. 181, the statement of a bleeding woman, that she had been stabbed by her husband, was admitted in evidence against him, though time enough had elapsed from the reception of the injury for the woman to run up stairs, and for the person to whom the statement was made to go out and fetch a watchman. The exact time is not given. The authority of this case is much weakened, if not destroyed, by subsequent adjudications of the same court. *Lund v. Tyngsborough*, 9 Cush. 36; *Chapin v. Marlborough*, 9 Gray, 244; *Commonwealth v. Densmore*, 12 Allen, 535. In *People v. Vernon*, 35 Cal. 50, the statement of the person injured, made within three-quarters of a minute after receiving the fatal shot, to the first person who reached him, was received. So, too, in *Mitchum v. State*, 11 Ga. 615, a statement made within one minute after the shot, to a person who heard it, and toward whom the wounded man ran instantly upon receiving it, was admitted in evidence. In *Ins. Co. v. Mosley*, 8 Wall. 397, statements made a longer time after the reception of the injury were admitted, though the exact time is not given. It probably did not exceed ten or fifteen minutes, and the statements were made to the first persons whom the injured man reached. The case was decided by a divided court, and we are by no means sure that the opinion of the minority is not the sounder, both upon principle and authority. The exception to the rule that declarations, in order to be admissible, must be simultaneous or contemporaneous with the principal event, as deduced from these

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and similar cases, seems to rest upon the idea that the interval of time has been very brief, that they are made to the person first proffering assistance or making inquiry, and that there has been neither opportunity nor motive for fabricating a false story.

The case at bar does not come up to these requirements. The time which elapsed between the drinking of the coffee by the deceased, and her statements with regard to it, is not fixed, but we gather from the record that about one hour probably intervened. Several persons had reached her and undertaken to relieve her before the manager of the plantation was sent for, and it is reasonable to suppose that surmises and suggestions had been made by them, as they gathered around her bedside, with reference to the nature and cause of her malady. If, under these circumstances, she had stated that her husband had put a powder in the coffee, and given it to her to drink, it would hardly be contended that this declaration could have been used against him in a subsequent prosecution for her murder. That she stopped short of this, and stated only that she had drunk the coffee, does not, so far as we can see, affect the result. We think the testimony was improperly admitted, and for this error we reverse the judgment, and award a new trial.

Judgment accordingly.

NOTE BY THE REPORTER.—In *Reg. v. Bedingfield*, tried last fall in England, an indictment for the murder of Eliza Rudd, evidence was offered that some ten or fifteen minutes before her death, and some twenty-five or thirty yards from her own door, she met the witness, with her throat cut, and said: "Oh, dear, aunt, see what Bedingfield has done to me!" Lord Chief Justice COCKBURN, after consulting with FIELD and MANISTY, JJ., excluded the evidence, holding it incompetent either as dying declarations or as part of the *res gestae*. This decision led to a controversy, somewhat heated, in the law journals, between his Lordship and Mr. John Pitt Taylor, author of a work on Evidence. That portion of the decision and the controversy relating to the doctrine of dying declarations is not material to our present purpose, which is simply to examine the leading cases on the subject of declarations as *res gestae* in criminal and particularly in capital cases. We shall refer to a few civil cases as illustrative, although we think in principle and policy they should be distinguished. The cases are apparently not numerous, and were nearly all referred to on the trials in question, or by the disputants alluded to.

In *Ree v. Futer*, 6 C. & P. 325, A. was charged with manslaughter in killing B., by driving a cabriolet over him. C. saw the cabriolet drive by, but did not see the accident, and immediately afterward, hearing B. groan, went up to him, when B. made a statement as to how the accident happened. Held, that the statement was competent evidence. GURNEY, B., said it was "clearly admissible;" and PARK, J., that "it was the best possible testimony that under the circumstances can be adduced to show what it was that had knocked the deceased down," referring to *Aveson v. Kinnaird*, 6 East, 193. In the latter case Lord ELLENBOROUGH said that if a wife left her husband's house, declaring at the time that she did so from immediate terror of personal violence, he should admit that declaration as evidence, but not if it were a collateral declaration of some matter which happened at another time, and referred to *Thompson v. Trevannion*, Skin. 403, where in an action by

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husband and wife, for wounding the wife, Lord Chief Justice HOLT allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing for her own advantage to be given in evidence. These cases are doubted by Lord Cockburn and by Roscoe. The latter says "they are difficult to reconcile with established principles," and he also says of *Rex v. Foster*: "It seems to require much consideration whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made immediately after the injury, but not under the circumstances which entitle them to be considered as dying declarations, are receivable in evidence."

In *Reg. v. Lunny*, 6 Cox's C. C. 477, the deceased had been wounded on the head, and died from the effects of the blow. A witness who lived in a house up a road leading from the highway, hearing a shout, went down to the latter and found the deceased, who appeared very weak and injured. He made a statement to her as to his having been robbed by the prisoner. The report states that the chief justice admitted the evidence as part of the *res gestæ*. The editor of the last edition of Russell on "Crimes," in citing this case, appended to the statement of the case the remark that "this case requires reconsideration."

In *Reg. v. Osborne*, 1 C. & M. 622, a prosecution for rape, the prosecutrix, on her way home, very shortly after the committing of the offense, met a woman to whom she made a complaint, stating the particulars. Mr. Justice CROSWELL refused to admit the particulars of such statement to be given in evidence, saying: "What the prosecutrix said at the time of the committing of the offense would be receivable in evidence, on the ground that the prisoner was present and the violence going on; but if the violence was over, and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence." He denied that *Avenn v. Kinraid* was in point. See *contra*, *State v. Kinney*, 44 Conn. 153; s. c., 26 Am. Rep. 436.

In the latter case the court said: "We are aware that the decision in this case goes further than the courts have gone in England, and in most of the States in this country, but still we think the rule adopted in this case is more conducive to the ascertainment of truth than the rule elsewhere established." To the same effect are the Ohio cases. *McCombe v. State*, 8 Ohio St. 646. The reason of the English rule was doubted in *Reg. v. Walker*, 2 M. & R. 212.

Commonwealth v. McPike, 8 Cush. 181, was an indictment for manslaughter of the defendant's wife. It appeared that the deceased ran up stairs from her own room in the night, bleeding and crying "murder!" Another woman, into whose house she was admitted, went at her request for a physician. A third person, who heard her cries, went for a watchman, and on his return proceeded to the room where she was. He found her on the floor bleeding. She said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The court decided that the evidence was properly admitted. It was said that it was of the nature of *res gestæ*. It will be observed that the declarations were not contemporaneous, but that considerable time must have elapsed between the time when the act was committed and that when the declarations were made; but the screams of the injured woman, her running into another room, her being found bleeding upon the return of the person who went for the watchman, all formed connecting links and rendered the declarations equally as satisfactory as if they had been made at the time the wounds were given.

In *Hadley v. Carter*, 8 N. H. 40, in an action for enticing away a servant, the declarations of the servant at the time of leaving, to the effect that he left of his own account, were admitted. The court said: "The declaration then is so connected with the fact as to give character to it, and the fact carried with it, at the same time, in the declaration, evidence of the motive."

In *Brownell v. Pacific R. R. Co.*, 47 Mo. 239, it was said: "The next question is in reference to the admission of the declaration of Brownell. The accident happened in consequence of a switch being left open on the defendant's track. There is no dispute or controversy about the fact that the switch was left open. Immediately after the accident, when Brownell was restored to consciousness, and just before he died, he said: * * * 'If it had not been for that man who left the switch open.' This was objected to, but the objection was overruled and the testimony admitted. As a dying declaration it was clearly inadmissible, for the modern decisions clearly establish the doctrine that the rule permitting dying

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declarations to be given in evidence applies exclusively to criminal prosecutions for felonious homicides, and has no reference to civil cases. But every declaration of a deceased person is not to be rejected upon this principle. Where a declaration is made by a deceased person contemporaneously, or nearly so, with a main event, by whose consequence it is alleged he died, as to the cause of that event, though generally the declaration must be contemporaneous with the event, yet where there are any connecting circumstances, they may, even when made some time afterward, form a part of the whole *res gestæ*." "The declaration of Brownell, in reference to the switch, grew directly out of and was made immediately after the happening of the fact. No one would hesitate to act on such evidence in his own concerns. It was so intimately connected that it made a part of the transaction itself, and I think clearly came within the doctrine of *res gestæ*."

In *Harriman v. Stowe*, 57 Mo. 93, a woman fell through a hatchway, about noon, and stated to a physician, called "between one and four o'clock" of the same day, that the hatchway had been left in an insecure condition, and she had stepped on it and fallen through. The court said: "The accident and the declarations formed connecting circumstances, and in the ordinary affairs of life no one would doubt the truth of these or hesitate to credit them as evidence. I can perceive no valid objection to their admissibility."

In *Hanover R. R. Co. v. Coyle*, 55 Penn. St. 402, where a peddler's wagon was struck and the peddler injured by a locomotive, the Supreme Court of Pennsylvania said: "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact." The declaration was held to be "a part of the transaction itself."

Insurance Company v. Mosley, 8 Wall. 397, was an action upon a policy of insurance. The question was as to whether the deceased, Mosley, came to his death by an accident inflicting personal injury, or whether he died of disease. To show that his death was caused by an injury received in consequence of an accident, his wife and son were called and testified that he had left his bed in the night, and that when he came back he said that he had fallen down stairs, and complained of being hurt. He died in a short time thereafter, and his death was believed to be the result of the injuries he received when falling. Upon an extended review of the authorities, the Supreme Court of the United States held that although the statements of Mosley were not admissible in evidence as dying declarations, yet they were properly receivable as part of the *res gestæ*. Judge SWAYNE, in his opinion, says: "In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally to the other. To reject the verbal fact would not unfrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. * * * Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestæ* are the declarations tending to show the reality of its existence and its extent and character. The tendency of recent adjudication is to extend rather than to narrow the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below. In the ordinary concerns of life no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. The weight of this reflection, in reference to the case under consideration, is increased by the fact that what was said could not be received as a dying declaration, although the person who made it was dead, and hence could not be called as a witness."

Lord COCKBURN alludes to the cases of *Commonwealth v. McPike*, *Insurance Co. v. Mosley* and *Harriman v. Stone*, but argues that the doctrine established by them is not the law of England. The matter is not very definitely treated by the text-books. Lord COCKBURN observes on this as follows:

"On turning to Professor Greenleaf's work I am met (at section 107) by a fine philosoph-

ical flourish, in which I am told that 'the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other'—that 'each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others.' 'Each' continues the philosophic writer—the profundity of thought deepening as he advances—'having during its existence its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature.' Having pondered with befitting reverence on the profound train of thought involved in these high-sounding and far-reaching phrases, I come back to the question of '*res gestæ*,' and I read on. 'These surrounding circumstances,' continues the learned author, here lapsing from the lofty region of philosophical abstraction to the practical and more common-place ideas of the jurist, 'may always be shown to the jury, along with the principal fact, provided'—provided what? Why that—'they constitute parts of what are termed the *res gestæ*.' To which is added that 'whether they do so or not must in each particular case be determined by the judge in the exercise of his sound discretion, according to the degree of relationship which they bear to the principal fact.' So that, as regards the meaning of *res gestæ*, we are here entirely at sea again. Till I came to the proviso, I thought I had begun to have some notion what *res gestæ* meant. I try it by its application to an every-day case. As I am walking along the street, a thief takes my purse from my pocket. I have to bear in mind that the theft will be attended with 'a complication of circumstances,' and 'will owe its birth to preceding circumstances,' and 'in its turn will be the prolific parent of others.' Thus, the theft being the principal fact, 'the preceding circumstances' will, I presume, be that I was in the street with my purse in my pocket and was not sufficiently alive to the danger of having my pocket picked, or was perhaps too sensible of the danger of being run over by a cab, to which all Her Majesty's subjects passing along the streets of this metropolis are hourly exposed, to see to the protection of my pocket. Next comes the fact that the thief, by a long train of other 'preceding circumstances,' had taken to the picking of pockets as a convenient and easy mode of gaining his livelihood and leading a luxurious life. Next come the circumstances of which the theft is 'the prolific parent.' I become aware that my purse is gone. I see the thief running away. I call out to a policeman, telling him that I have been robbed by the man who is disappearing in the distance. The policeman hastens in pursuit, and being a more than usually active policeman, succeeds in overtaking and capturing the thief. The thief is taken to the station, and afterward committed for trial at the Central Criminal Court, and there tried and sentenced to an appropriate, and I hope sufficient punishment; so that he will abstain from picking pockets in future, or at all events, if he sees me in the street again, will keep his hand out of my pocket, though it may be at the expense of somebody else's. Lastly, the prosecution cost me more than the amount I had in my purse. The 'inseparable attributes,' and 'kindred facts,' connected with the taking of the purse, may be, that the thief, in order to effect his purpose, knocks me down, or trips me up, or pushes my hat down over my eyes, or holds my hands, while helping himself to my purse. Thus far I have no difficulty in seeing that the circumstances attending the original transaction form part of the *res gestæ*. But what if the stout and heavy policeman, having failed to catch the light-footed, as well as light-fingered, thief, I give him on his return, out of breath, a full and correct description of the criminal? Or suppose that not seeing a policeman, and being myself too old or heavy to pursue the nimble thief, and the latter having consequently escaped, I see a friend in the street, and seeking consolation in venting my griefs to him, I state to him all the circumstances of the transaction, including a description of the thief—would either of these statements form part of the *res gestæ*? In the improved text-books to which I have turned for information all that I find laid down is, that such statements will be admissible if forming part of the *res gestæ*; but as to what is to be understood as comprehended in this uncertain term, I am left as much in the dark as I was before. Instead of finding any rule for my guidance, I am told that it is a matter for the judge to determine according to his sound discretion." See *Hawker v. Baltimore and Ohio Railroad Co.*, post; 14 Am. Law Rev. 817; 15 id. 1, 12.

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(57 Miss. 508.)

Bankruptcy — discharge — fiduciary debt.

Where the agent of a bank appropriated the proceeds of notes collected by him for the bank, to which they were sent for collection, his liability to the bank therefor may be discharged in bankruptcy.*

ACTION to recover money wrongfully appropriated. The opinion states the case. The defendant had judgment below.

M. Green, for plaintiff in error.

S. M. Shelton, for defendant in error.

CHALMERS, J. J. & T. Green, bankers in the city of Jackson, forwarded for collection to J. M. Chilton, their correspondent and agent, at Clinton, certain drafts and notes which had been intrusted to them by their foreign correspondents. Chilton collected the paper, appropriated the proceeds to his own use, and now, to this suit by the Greens to recover the amount from him, interposes a plea of a discharge in bankruptcy, granted him since the reception of the money. The legal question presented is whether the liability was a fiduciary debt within the meaning of the bankrupt law, and therefore not dischargeable in bankruptcy.

It was held in *Chapman v. Forsyth*, 2 How. 202, that the words "fiduciary debts," used in the Bankrupt Law of 1841, embraced only liabilities arising under technical or express trusts strictly so called and not implied trusts or those springing from contract. This construction would exclude from the operation of the words the liability here involved. It was held in the case of *In re Kimball*, 2 Bank. Rep. 204, 354, both by the District and Circuit Courts for the Southern District of New York, that the Bankrupt Act of 1867 was broader than that of 1841, and that all debts were to be considered as of a fiduciary character where any element of trust entered into the circumstances of their creation. This decision made by

* See *Woodward v. Towne*, ante, p. 387.

Judge BLATCHFORD, and affirmed by Judge NELSON, has been extensively followed elsewhere; but more recently a different doctrine has prevailed, and it now appears settled that there is no substantial difference between the acts of 1841 and of 1867 in this regard. Such is the express adjudication in *Grover v. Clinton*, 8 Bank. Rep. 312; *Keime v. Graff*, 17 id. 319; *Cronan v. Colting*, 104 Mass. 245; s. c., 6 Am. Rep. 232; and such seems to be the doctrine of the Supreme Court of the United States in *Neal v. Clark*, 95 U. S. 704. Adopting the later decisions as affording the proper construction of the act of 1867, it follows that the liability of the defendant was not embraced in the exception as to fiduciary debts, and was released by the discharge in bankruptcy.

Judgment affirmed.

McGEE V. WALLIS.

(57 Miss. 688.)

Estoppel — void execution sale — reimbursement.

Where one bid off land belonging to a testator on a sale under a judgment against his executor, and paid the amount believing that he was getting title, and the money was applied to the judgment debt with which the land was charged by the will, held, that the heirs could not recover the land without reimbursing him, and would be enjoined accordingly.

BILL for injunction. The opinion states the case. The defendant had judgment below.

C. V. Gain and T. C. Calchings, for appellants.

R. A. Anderson, for appellees.

GEORGE, C. J. Joseph Wallis was guardian of the four minor children of his deceased brother, and as such, was indebted to each one of his wards. He died in November, 1861, without having made a final settlement of his accounts. He left a will, which was afterward duly probated, in which he appointed one Weatherby his executor, and devised to him all his real and personal estate to have

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and hold the same in trust for the payment of his debts. The will directed that immediately after his death his real estate and perishable property should be sold by the executor, and that his debts should be paid, and the remainder invested for the benefit of his heirs. Weatherby, the executor, settled the guardianship accounts of Joseph Wallis, and a considerable sum was found due to each of the wards, for which decrees were entered in the Probate Court against said executor, authorizing executions to be issued for the collection of the same. In 1866 executions were issued on these decrees, and placed in the hands of the sheriff of Attala County, who levied the same on a tract of land which belonged to the deceased guardian and testator at the time of his death. The sheriff, after due advertisement, offered said land to the highest bidder, and the appellant, H. B. McGee, became the purchaser for the sum of twenty-seven hundred dollars. McGee, paid his bid to the sheriff, who paid it to the plaintiffs in the executions. McGee afterward sold the land with warranty of title to another one of the appellants, who sold to the third. In 1879 the heirs of the said Joseph Wallis brought ejectment and recovered this land, upon the ground that the sale was void, the executions and judgments against the executor not authorizing a levy on realty. On this state of facts the appellants filed their bill in the court below, seeking to restrain the enforcement of the judgment in ejectment, until the plaintiffs therein should pay the purchase-money bid at the sheriff's sale, and which had gone to the discharge of a valid debt of Joseph Wallis, the ancestor of the plaintiffs in ejectment. The defendants in that bill, the appellees here, demurred to it, and their demurrer was sustained and the bill dismissed, and the complainants appealed.

The precise question presented by this record, though new in this State, depends for its solution upon principles which have received the sanction of this court in several decided cases. It will be observed that the debt due the wards of Joseph Wallis, and established by the decrees of the Probate Court in their favor, was not only by the provisions of the statute, but also by the express terms of the will, made a charge upon all the estate of the testator, both real and personal; and that by the sale of the land, which is the subject of this controversy, the debt was satisfied. This sale was void, because a judgment against an executor does not authorize a levy on and sale of the real estate of his testator. The result is, that though the sale operated to raise the money, which went to the sat-

isfaction of these decrees, yet no title was conferred by it on the purchaser. His money has exonerated the property of the estate from a legal and valid charge, and he is disappointed in the belief, on which he acted in parting with his money, that he was acquiring a valid title to the property which he bought. The heirs of the testator now seek to recover the land thus erroneously sold, and at the same time claim to retain the benefit which accrued to them by the satisfaction of the debt. Whether this claim can be successfully maintained is the question presented for our decision. If the appellants can successfully resist this claim, their right must be founded on the maxim of the common law, *nemo debet locupletari ex alterius incommodo*, and on a similar maxim, of the civil law, which Judge STORY, in *Bright v. Boyd*, 1 Story, 478, 494, says more exactly expresses the idea, viz.: *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores*.

This principle seems to have first received practical recognition in courts of equity in the rule adopted by those courts which gave to *bona fide* purchasers of land acquiring no title compensation for improvements which they had made under the belief that they were the true owners. At first, however, in cases of that sort, relief was granted only when the true owner came into equity as a complainant seeking an account against the purchaser for mesne profits after a recovery of the land in an action at law, or when such owner had only an equitable title, and was compelled to sue in equity for a recovery of the land. In these cases, the court refused its aid to the complainant except upon the terms of compensation to the *bona fide* purchaser, for his improvements. Chancellor WALWORTH as late as the year 1835, in *Putnam v. Ritchie*, 6 Paige, 405, declared that he had not been able to find a single case in England or America in which this relief was granted to the purchaser on a bill filed by him for that purpose ; and he declined to make a precedent in that case, though recognizing the equity of the complainant's claim.

The first case, so far as our researches extend, in which this relief was granted on a bill filed by the purchaser against the true owner who had recovered the estate, is *Bright v. Boyd*, 1 Story, 478, decided in 1841. In that case, Judge STORY, on a bill filed by the purchaser, not only gave him compensation for the improvements, but expressed his concurrence in the principle of the civil law,

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“that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him.” This principle seems now to be fully established. It has been recognized in the following cases in this court: *Jayne v. Boisgerard*, 39 Miss. 796; *Short v. Porter*, 44 id. 533; *Cole v. Johnson*, 53 id. 94; *Gaines v. Kennedy*, id. 103. In *Short v. Porter*, this court decided that a purchaser of land at a void sale, made by an administrator for the payment of debts, was entitled to be subrogated to the rights of a lien creditor whose debt had been discharged by the money paid on the void purchase. Chief Justice SIMRALL, speaking for the court, said that the equity of the complainant rested upon the impregnable ground that he (the purchaser), supposing that he was acquiring the title of the heirs of the intestate, at the sale made by the administrator, made a cash payment, which was actually used and applied by the administrator to discharge a preferred lien on the land. As to the heirs, that application of the money exonerated their property *pro tanto*. It went to release an incumbrance on the land. They would not be permitted to recover back the land except upon the condition that they restored to the purchaser his money. He cited *Jayne v. Boisgerard*, 39 Miss. 796, which recognizes the same principle. *Short v. Porter* was confirmed in *Cole v. Johnson*, 53 Miss. 94. In *Gaines v. Kennedy*, 53 id. 103, this court, in a similar case, said: “It has been settled in our jurisprudence, on grounds most just and equitable, that where real estate has been sold for the payment of debts by an administrator who has so used the fund, the heir cannot recover the land, and hold it disincumbered of the intestate’s debts, which have been discharged by the money of the purchaser, but the land will be charged with the amount of the debts thus paid off for the use of the purchaser.”

A similar decision was made by the Court of Appeals of Virginia in *Hudgin v. Hudgin*, 6 Gratt. 320. In *Valle v. Fleming*, 29 Mo. 152, the purchaser at a void administrator’s sale sought to be subrogated to the right of a mortgagee whose debt had been paid off by the purchase-money. The court, in an able and elaborate opinion, vindicated the doctrine of the above cited cases, and showed with how much more force it applies to fix a charge on the land for the money used to discharge a debt for which the estate was bound,

than to compensating the evicted purchaser for his improvements. On this point, the court said: "It might have been urged that the true owner, if ignorant of his title and not aware of the improvements which the actual occupant was putting on the land, ought not to pay for improvements which he had not directly or indirectly authorized, and which might not at all suit his wants or his fancy. But such an argument could not be used in the case now before us. The purchase-money has gone to extinguish a mortgage which the owner was bound to extinguish before he could get the land. It was not a matter of taste or fancy."

These decisions seem to be decisive of the question before us; but it is attempted to distinguish these cases from the one at bar. It is urged that in all these cases there was an attempt to sell the land by the legal representatives of a decedent under the decree of a competent court; that though the decree was void because the formalities prescribed by law were not observed, it was nevertheless an actual attempt to condemn and sell the property by a tribunal having jurisdiction over the subject; that a sale made by a sheriff stands on a different footing, since it is but the unauthorized act of a purely ministerial officer, as to whose sales the maxim of *caveat emptor* applies with full force.

We do not perceive the justice of this distinction. The rule of the civil law, which we have quoted above from Judge STORY, and which has now been fully incorporated into the equity jurisprudence of this State, embraces all cases in which a *bona fide* purchaser pays money to discharge any existing incumbrance or charge on the estate, having no knowledge of the infirmity of his title; and when it is applied to compensation for improvements made by a *bona fide* purchaser, who has been evicted by paramount title, the rule embraces all such, whether they were purchasers at judicial or at private sales. The equity of the rule, it is clear, has no reference to the mode in which the *bona fide* purchaser had acquired possession, since there can be no policy which would prefer one mode to another, provided only the acquisition of possession was honestly made under a *bona fide* belief that the occupant acquired title.

This good faith must exist as a pre-requisite to the right of the purchaser to demand compensation for improvements and a restitution of the purchase-money; and the ground upon which this compensation and restitution are exacted from the owner is the plain injustice of permitting him to reap the benefits of the un-

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recompensed labor and money of another. The right of the purchaser to demand restitution is grounded on his good faith in making the purchase; the duty of the owner to make the restitution arises from his having received the benefit of the money of the purchaser in releasing his estate from a legal charge. In cases like the one before us, the equity of the purchaser to a return of his money, and the inequity of allowing the true owner to recover the land disencumbered, without restoring the money by which the incumbrance was discharged, rise so high as to fully justify the Supreme Court of Missouri, in the case above cited from that State, in characterizing any code of laws which would deny the one or tolerate the other as being "very imperfect or very inequitable." See 29 Mo. 164.

The rule can derive no force or vitality from the circumstance that the void sale has been made under the void order of a court. Such an order is utterly null, and without any force whatever. Being such, it *per se* imparts no force to the sale, confers no right on purchasers, and deprives the owners of none. It is the belief of the purchaser that he is getting a good title, and the actual application of the money to the benefit of the owner in removing a charge on his estate, which constitute the equity. But the principle has been applied, in this State, to other cases besides sales. In its most enlarged application as heretofore recognized in this State, it may be said to embrace all cases in which a person advances money with the intent that it shall be applied, and it is actually applied, to remove a legal charge from an estate belonging to another, where the advance is in consequence of a belief, on the part of the creditor, whether well or ill-founded, that he to whom he makes the advances stands in such relation to the estate that he has a right to make the application. Thus, in *Woods v. Ridley*, 27 Miss. 119, it was conceded that a person lending money to an administrator could thereby fix a liability on the estate to repay it, if it were actually used to pay a valid charge on it, the administrator having no other assets in his hands with which to make the payment. By such application beyond assets, the administrator would become a creditor of the estate, and Chief Justice SMITH said that the lender's equity would arise from the use of the money in the payment of the debts of the estate, and being a creditor thereby of the administrator he would be permitted to take his place and be subrogated to his rights. The maxim of *caveat emptor* is also

without force to establish the distinction relied on. That maxim, under the laws of this State, is equally applicable to sales made by administrators and by sheriffs. It applies where there is a failure of title, because of a want of ownership in the property by the defendant in execution or in the intestate, but it does not apply to defects in the title of the purchaser, occasioned by a failure of the sale to pass the title of the defendant or intestate. And this is the case at bar; the title of the decedent is undisputed, and is that on which his heirs have succeeded in the action of ejectment.

In *Howard v. North*, 5 Tex. 290, the court applied the principle to a sheriff's sale, which was void, and therefore failed to convey the title of the defendant in the execution. The court declared that the purchaser would be entitled to have the amount of his bid, paid in discharge of the execution, refunded before a restoration of the property would be decreed. In *Dufour v. Camfranc*, 11 Martin, 607; 13 Am. Dec. 360, Judge PORTER speaking for the court, after having declared a sheriff's sale void, said: "It has been proved that the proceeds arising from the sale (sheriff's) of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in this suit, until he repay that money. This is the doctrine expressly laid down by Febrero, Lib. 3, Cap. 2, § 5, n. 357. And we readily adopt it; for nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale, to discharge his debts." In *McLaughlin v. Daniel*, 8 Dana, 182, the Supreme Court of Kentucky applied the principle to a sheriff's sale, declaring that the purchaser who had got nothing was entitled to recover from the defendant in execution the money paid in discharge of his debt.

We unhesitatingly announce our concurrence in the principle which entitles the complainants to relief. It would be in the highest degree inequitable to allow these heirs to recover this land, and at the same time to hold it cleared of the charge which the complainant's money has extinguished. There is no obligation on them to return the money, if they will allow the sale to stand; but if they seek to avoid the sale, they must do so only on the just condition that they restore all the fruits of it which they have enjoyed. If the complainants make out the case stated in their bill, they will be entitled to have a decree enjoining the judgment at law, unless the amount of the purchase-money, which may be shown to

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have gone to the payment of just charges on the estate of Joseph Wallis with legal interest, be refunded to them. Unless this is done, and in some short time to be named by the chancellor, the injunction should be made perpetual. As, however, it may turn out that the land is more valuable than the amount that may be found due, and the defendants may be unable to raise the money, the court may on their application order a sale of the land to meet the payment; but if a sale is ordered, it will be at the cost of the defendants exclusively. Should there be an excess in the proceeds of the sale, after paying the complainants' demand, it will belong to the defendants. The bill shows that mesne profits and improvements were settled by the judgment in ejectment, there being an excess of \$200 in favor of the complainants, in the value of improvements over mesne profits. This \$200, should a sale be decreed, must also be paid out of the proceeds; but the mesne profits accruing since the judgment in ejectment, must be charged to the complainants. Should no sale be asked for, the decree will simply be a perpetual injunction against the defendants' claim to the land.

Decree reversed, demurrer overruled and cause remanded.

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(57 Miss. 746.)

Party-wall — destruction of building.

Where houses having a party-wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of the part on his ground.

BILL for injunction. The opinion states the case. The defendant had judgment below.

Shelton & Crutcher, for appellant.

Miller & Hirsh, for appellee.

CHALMERS, J. The complainant and the defendants were the owners of adjoining lots in the city of Vicksburg, upon each of which stood brick buildings connected by a party-wall, one-half of

which rested on either lot. The buildings had been so constructed more than twenty years before, by one who then owned both lots; and in consequence of sales by him to different persons, they had become by subsequent conveyances the property in severalty of the parties to this suit. On March 17, 1879, the building of the complainant was totally, and that of the defendants partially, destroyed by fire. The party-wall was somewhat injured, but to what extent is a matter of dispute. Both parties were insured by the same company, and upon an estimate of damages made by experts, received payment from the company upon the basis that the party-wall had been rendered useless and would have to be rebuilt. The defendants insist that they received their money from the insurance company in bulk and without knowledge that in so doing they obtained payment in full for one-half the value of the wall. Shortly afterward they began to repair or rebuild their house, using the old party-wall for this purpose, whereupon the complainant filed this bill, enjoining them from so doing, alleging that the wall was unsafe and dangerous, and praying that it should be torn down and rebuilt from the foundation, if thereafter to be used as a party-wall. The defendants having answered, averring the entire safety and trustworthiness of the wall, much testimony was taken on the subject, which seems to have satisfied the chancellor that the wall was not materially injured and would subserve the purposes of new buildings similar to the old ones. He therefore dismissed the bill. We are not prepared to say that the chancellor erred in his conclusion of fact, but we think, that independently of the question of the condition of the wall, the complainant was entitled to the relief prayed, and it will not be denied him because he rested his claim to it upon improper grounds since it cannot be claimed, except as a matter of costs, that by so doing he has misled his adversary or occasioned any surprise to him. As he was, in our opinion, entitled, upon the destruction of his house, to put an end to the easement previously enjoyed by the defendants in so much of the wall as rested upon his lot, and to decline longer to treat the wall as a party-wall, his legal rights should not be prejudiced because he gave as a reason for desiring to do so the unsafe character of the structure.

The owners of adjoining building, connected by a party-wall resting partly upon the soil of each, are neither joint owners nor tenants in common of the wall. Each is possessed in severalty of

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his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and building of such other. Each, therefore, is bound to permit his portion of the wall to stand, and to do no act to impair or endanger the strength of his neighbor's portion so long as the object for which it was erected, to wit, the common support of the two buildings, can be subserved; and each will consequently be liable to the other for any damage sustained by a disregard of this obligation. But the obligation ceases with the purpose for which it was assumed, namely, the support of the houses of which the wall forms a part. If those houses, or either of them, are destroyed without fault upon the part of the owner, he is not bound to rebuild in exactly the same style and in exactly the same spot because his neighbor demands it. That this is true where the wall itself is swept away with the house, is settled by authority. *Partridge v. Gilbert*, 15 N. Y. 601; *Sherred v. Cisco*, 4 Sandf. 480. It must be equally so where the wall alone remains. A wall is but a portion of a house, and the one is valueless without the other. To hold that so long as the wall stands the owner whose house has been destroyed is compelled to lose the use of his lot or to replace the destroyed building with another of exactly the same pattern, is to sacrifice the greater to the less, and to impose in perpetuity a servitude which was assumed only for a specific purpose. Such a doctrine, if enforced in the growing towns and cities of America, where localities which are dedicated at one time to residences are swallowed up in a few years by the encroaching demands of trade, would be intolerable. If he who has, in conjunction with his neighbor, erected dwelling-houses with party-walls, is thereby obliged, as often as his residence is destroyed, to replace it with one of exactly similar pattern, it would seriously impair the value of property and impose fetters on its ownership too rigorous to be endured. We think the obligation is only that so long as the houses stand the owner of neither shall do any thing to impair the property of the other, and either shall be at liberty to repair and keep in order the common wall; but when, without the fault of either, the houses are destroyed, the easement is at an end, and each becomes the owner in severalty of his own soil and of so much of the wall as stands upon it, with a perfect right to tear

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it down or dispose of it in any way he sees proper. The decree will be reversed and the cause remanded, with instructions to enter a decree for the complainant; but as the complainant, by tendering a false issue, is responsible for much of the costs incurred, the costs of the lower court will be divided, the appellees to pay costs of this court.

Decree accordingly.

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(57 Miss. 739.)

Corporation — malicious prosecution.

A corporation is liable to an action for a malicious prosecution conducted by its agents. (*See note, p. 495.*)

ACTION for malicious prosecution. The opinion states the point. The defendant had judgment below.

W. H. Hardy and John W. Fewell, for plaintiff in error.

Nugent & McWillie, for defendants in error. A corporation cannot be sued for a malicious criminal prosecution. It is incapable of malice in criminal prosecutions. *Owsley v. Montgomery Railroad Co.*, 37 Ala. 560; *Gillett v. Missouri Valley Railroad Co.*, 55 Mo. 315; s. c., 17 Am. Rep. 653. In the latter case the court clearly illustrate the difference between those cases in which an action would lie against the corporation for the malice of its agents, and when not. They review all the cases in favor of the right to maintain the action; explain *Goodspeed v. East Haddam Bank*, 22 Conn. 530, as being founded on a statute of the State, and the prosecution a civil suit by attachment, and conclude that the action brought in that case came within the powers of the corporation to sue for injuries to its property, and if that power was abused and perverted to malicious purposes, it was properly held that the corporation should be held liable for whatever damages might result. As thus explained, the case of *Goodspeed v. East Haddam Bank*, *ubi supra*, is not in point. In *Vane v. Erie Railway Co.*, 3 Vroom, 334, it does not appear whether the prosecution

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complained of was criminal or civil, and in *Childs v. Bank of Missouri*, 17 Mo. 213, the court denied the liability.

CAMPBELL, J. The objection to the declaration for misjoinder is not well taken. We have compared the declaration with approved precedents of declarations in case for malicious prosecution, and it conforms to them. The averment of the imprisonment of the plaintiff in consequence of the malicious prosecution did not convert the action into trespass for false imprisonment, even under the absurd refinements of the common-law pleaders in their subtle distinctions between trespass *vi et armis* and case.

The real question of substance presented by the demurrer is, whether a corporation aggregate is liable to an action for malicious prosecution. The old doctrine was that a corporation was not so liable, because malice is the gist of the action, and it was said that malice could not be imputed to a mere legal entity, which having no mind could have no motive and therefore no malice, and this narrow view still prevails to some extent. But the steady process of judicial evolution has led to the establishment in some of the courts of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents, under the conditions that attach to individuals. *Philadelphia Railroad Co. v. Quigley*, 21 How. 202; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Vance v. Erie Railway Co.*, 3 Vroom, 334; *Copley v. Grover & Baker Sewing Machine Co.*, 2 Woods, 494; *New Orleans Railroad Co. v. Bailey*, 40 Miss. 395. We approve this doctrine, and hold that a corporation may be held liable for a malicious prosecution conducted by its officers and agents, just as if the corporation was a natural person.

Judgment reversed, demurrer overruled and cause remanded.

NOTE BY THE REPORTER.—The doctrine of this case was held in *Wheless v. Second Nat. Bank*, 1 Baxt. 469; s. c., 25 Am. Rep. 783.

The leading case on this precise question is *Goodspeed v. East Haddam Bank*, 22 Conn. 530, holding the doctrine of the principal case. CHURCH, C. J., delivered the prevailing opinion, in which WAITE, J., concurred; ELLSWORTH and HENMAN, JJ., dissented; STORRS, J., having tried the cause below, did not sit. CHURCH, C. J., said: "These institutions have so multiplied and extended within a few years, that they are connected with, and in great degree influence, all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this; but we say, that as new relations from this cause are formed and new interests created, legal principles, of a practical rather than of a technical or theoretical character, must be applied." "The views of the old lawyers, regarding the real nature, power, and responsibilities of corporations, to

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a great extent, are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle." "But after all, the objection to the remedy of this plaintiff against the bank in its corporate capacity, is not so much that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore cannot commence or prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one; they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action; and still to claim, that although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application."

The contrary view was taken in *Owsley v. Montgomery and West Point R. R. Co.*, 57 Ala. (N. S.) 560. The court there said: "It was supposed at one time that an action for a tort would not lie against a corporation. But this idea has been long since exploded, and the tendency of the law in our day is to extend the application of all legal remedies to corporations, and to assimilate them as far as possible, in their legal duties and responsibilities, to individuals." "But it seems to be the law, that inasmuch as a malicious motive and a criminal intent cannot be attributed to a corporation, in its corporate capacity, it is not indictable for those crimes, of which malice or some specific criminal intent is an essential ingredient." "The distinction seems to be between acts injurious in their effects, and for which the actor is liable without regard to the motive which prompted them, and conduct, the character of which depends upon the motive, and which apart from such motive cannot be made the ground of a legal responsibility. If this distinction is well taken, it would follow that since a corporation, as such, is incapable of malice, it is not liable to be sued for a malicious prosecution." "And such appears to us to be the better opinion, although we are aware that the authorities which seem to sustain the idea that an action for a malicious prosecution may be maintained against a corporation." This is founded on *Childs v. Bank*, 27 Mo. 213, and on dicta in *Stephens v. Midland Counties Co.*, 10 Exch. 352, and *McClellan v. Cumberland Bank*, 24 Me. 586.

The case of *Gillett v. Mo. Valley R. R. Co.*, 55 Mo. 315; s. c., 17 Am. Rep. 653, limits *Childs v. Bank of State of Missouri*, 17 Mo. 213, which had denied the liability of corporations for assault and battery, malicious prosecution, or slander; and admits that corporations may be liable in such actions, if the act comes within the purview of their charter, powers and is within the scope of the agent's authority, or is ratified. But the alleged malicious prosecution there being a criminal prosecution for embezzlement, it was held that this was not within the scope of the corporation's general or special powers, and therefore the action would not lie.

On the authority of the *Gillett* case, the case of *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505, holds that a corporation may be liable for a malicious prosecution and says, "there has been a complete change in the rulings in this respect since *Childs v. Bank of Missouri* was determined." The case of *Carter v. Howe Machine Co.*, 51 Md. 290, was exactly like the *Gillett* case in circumstances, and it was held that although a corporation is liable to an action for malicious prosecution, yet in such a case the agent must be shown to have express authority for his act, or it must have been ratified.

The doctrine of the principal case was held in *Vance v. Erie Ry. Co.*, 23 N. J. L. 331. The court rested upon English cases, hereinafter cited, and said: "If actions for malicious libel, for vexatious suits, for vexatiously and maliciously obstructing another in his business, for willful trespasses, and for assault and battery, in each of which the motives and

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intent of the mind are directly involved, can be maintained against a corporation aggregate, no reasons, founded on principle, can be suggested why an action for malicious prosecution should not also be sustainable against a corporation." "When the nature of the action is considered, it comes strictly within the principles by which the actions above enumerated are maintainable." "To hold a corporation amenable to this particular action is strictly in accordance with well-settled legal principles." The action "involves nothing more than a wrongful act intentionally done."

The same was held in *Fenton v. Wilson Sewing Machine Co.*, 9 Phila. 189, where the authorities are exhaustively reviewed. So in *Copley v. Grover & Baker Sewing Machine Co.*, 2 Woods, 494 (Alabama Federal Circuit), where the *Owsley* case was disapproved. The court said: "It is not true that a corporation has no mind. Its mind is the joint product of the minds of its officers and directory in a united organization, and in point of fact corporations bring into their service the highest order of ability and the best executive talent in the country." This is rested chiefly on *Railroad Co. v. Quigley*, 21 How. 202.

In *Stevens v. Midland County Ry. Co.*, 10 Exch. 352, ALDERSON, B., *obiter* expressed an opinion that the action would not lie, but the decision was put on another ground. In *Whitfield v. Ry. Co.*, E. B. & E. 115, Lord CAMPBELL overruled a demurrer in such an action, observing, "there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

A corporation is civilly liable for vexatiously obstructing one's trade, *Green v. London Omnibus Co.*, 7 C. B. (N. S.) 290; for assault, *East Counties Ry. Co. v. Broom*, 6 Exch. 814; *Moore v. Fitchburgh Railroad*, 4 Gray, 465; *Hanson v. European & N. A. Ry. Co.*, 62 Me. 84; s. c., 16 Am. Rep. 404; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa, 814; s. c., 24 Am. Rep. 748; *Passenger R. Co. v. Young*, 21 Ohio St. 518; s. c., 8 Am. Rep. 78; for false imprisonment, *Owsley v. R. Co.*, *supra*; for libel, *Phila., etc., R. Co. v. Quigley*, 21 How. 202; for nuisance, *First Baptist Church v. R. Co.*, 5 Barb. 79; and may be indicted for obstructing a highway, *Reg. v. Gt. North of Eng. Ry. Co.*, 9 Q. B. 815; for libel, *State v. Atchison*, 3 Lea, 729; s. c., 31 Am. Rep. 668; for Sabbath breaking, *State v. Balt. & C. R. Co.*, 15 W. Va. 362, *post*; and may be punished for contempt, *People v. Albany & Vl. R. Co.*, 12 Abb. Pr. 171; s. c., 20 How. Pr. 328.

In *First Nat. Bk. of Carlisle v. Graham*, 100 U. S. 699, the court remarked: "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merchants' Bank v. State Bank*, 10 Wall. 645. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the objects of its creation or beyond its granted powers. It may be used for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence. *P. W. & B. R. Co. v. Quigley*, 21 How. 209; 2 Wait's Actions and Defenses, 337, 338, 339; Angell & Ames on Corp., §§ 186, 385; Cooley on Torts, 119, 120."

In *Edwards v. Midland Ry. Co.*, Q. B. Div., Dec. 16, 1880, 43 L. T. (N. S.) 694, a question reserved was, whether a corporation could be liable for an act which required malice in order to be actionable. Fry, J., held that the company were liable. We extract the following from his opinion:

"The question which I have to determine is this, whether or no a railway company can be liable in an action for malicious prosecution. The malice which will support a cause of action need not be express. It may be implied from a wrongful act being done without just cause or excuse, and it is enough therefore if such malice can be attributed to a railway company. It is obvious that great evils would arise if, on the ground that a corporation can have no mind, and therefore can have no malice, a corporation were able to escape from that liability which if they were not incorporated they would have to bear."

"Now how do the authorities stand? They stand in this way: The question came before the Court of Exchequer in *Stevens v. Midland Railway Co.*, 10 Ex. 352, and three judges expressed their opinion in that case. ALDERSON, B., went upon the proposition that in order to support the action it must be shown that the defendant was actuated by animus

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in his mind, and that a corporation has no mind. The two other learned judges, PLATT, B., and MARTIN, B., without expressly dissenting from that proposition, declined to enunciate it, and determined the case upon the ground that there was not sufficient evidence of authority to affect the defendants, the railway company. That case, therefore, so far as it bears upon the present investigation, is the authority only of the very eminent judge ALDERSON, B. Now has that case been followed? Mr. Powell says it has been followed by a case in Australia, in which the chief judge, differing from his two learned brethren, followed the decision of ALDERSON, B. Is that decision of ALDERSON, B., consistent with other authorities which bear upon the same question—I mean the question of malice in a corporation? Now so far back, I find, as the great trial on *Quo Warranto of Rex v. City of London*, the point appears to have been considered. There it appears SAUNDERS, L. C. J., allowed a demurrer, according to the statement of the pleadings which I find in a note appended to *Whitfield v. South-Eastern Railway Co.* in 1 Ell. Bl. & Ell. 122, and which no doubt therefore is correct, and contemplated the proposition that a corporation aggregate could be charged with maliciously publishing a libel. No doubt it may be said that that decision is on some grounds not of the greatest weight, that is to say, it was a decision which is often considered to have been affected by political as well as by legal considerations. Still it was the decision of a very great and very eminent judge. Then, again, the question arose for decision in the case of *Yarborough v. Bank of England*, 16 East, 6, and there Lord ELLENBOROUGH referred to an earlier case, I think in 1871, of *Argent v. Dean and Chapter of St. Paul's*. There he says the action was 'for a false return to a mandamus respecting an election to a vergers place in that cathedral, and no objection was made that the action would not lie. Vidian's Entries, p. 1, is an action for a false return against the mayor and commonalty of the city of Canterbury, for a false return to a writ of mandamus to restore an alderman to his precedence of place, etc. It states the mayor and corporation as attached to the answer, and the return as falsely and maliciously made. The instances of actions against corporations for false returns to writs of mandamus, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries.' The question again came before the court for consideration in the case of *Whitfield v. South-Eastern Railway Co.*, 31 L. T. (O. S.) 113; 27 L. J. 229, Q. B.; 1 Ell. Bl. & E. 122, where a count against a railway company as a corporation aggregate was held good on demurrer, and there Lord CAMPBELL said: 'The demurrer to the declaration in this case can only be supported on the ground that the action will not lie without proof of express malice, as contradistinguished from legal malice. But if we yield to the authorities which say that in an action for defamation malice must be alleged (notwithstanding authorities to the contrary), this allegation may be proved by showing that the publication of a libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill-will to the plaintiffs, and did not mean to injure them. Therefore the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation.' He held, therefore, that it clearly might be implied, and therefore in certain cases express malice might be proved. Then, again, in *Green v. London General Omnibus Co.*, 1 L. T. (N. S.) 95; 7 C. B. (N. S.) 290, a similar question came before the Court of Common Pleas. The marginal note is to this effect: 'A corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation.' The allegation there was that the placing and driving of omnibuses in the manner complained of was done wrongfully, vexatiously and maliciously, and judgment was delivered by ELLER, C. J. He said: 'This is an action against the defendants for wrongfully, vexatiously and maliciously interfering with the plaintiff's rights by causing their vehicles to be driven in such a manner as to obstruct and molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground of the demurrer is, that the declaration charges a willful and intentional wrong, and that the defendants,

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being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie.' I pause to observe that to my mind it is equally absurd to suppose that a body corporate can do a thing willfully, which implies will, intentionally, which implies intention, or maliciously, which implies malice. They are all acts of the mind, and one is no more capable of being done by a corporation aggregate than the other; so if there is absurdity in the one case there is equal absurdity in all the others. The judgment proceeds: 'But the whole of the acts that are charged against the defendants are acts connected with driving vehicles, and the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation. Unless the acts charged were wrongfully done the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies, and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of *Yarborough v. Bank of England*, 16 East, 6, down to *Whitfield v. South-Eastern Railway Co.*, 1 Ell. Bl. & E. 115 (which is the case I just now referred to), which was in reality an action against the Electric Telegraph Company, shows that an action for a wrong will lie against a corporation where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. Giffard — that a corporation, having no soul, cannot be actuated by a malicious intention — is more quaint than substantial.' In other words, I understand the Court of Common Pleas in that case to have disregarded as quaint and not substantial the *ratio decidendi* of ALDERSON, B., in the case of *Stevens v. Midland Railway Co.*, 10 Ex. 352. In my judgment, therefore, that dictum or decision of his has been overruled, or rather has not been followed by a court of co-ordinate jurisdiction. Therefore I feel myself at liberty, in that condition of the authorities, and as at liberty I think I am bound to decide according to what I conceive to be the true view of the law. That being so, it only remains to inquire whether or no this was done within the scope of the incorporation. Now those great railway corporations are bound to maintain, and in fact they do maintain, police for the purposes of restricting the commission of crime upon their railways, and the observations in the judgment of Lord BLACKBURN, then a member of the Court of Queen's Bench, in the case of *Goff v. Great Northern Railway Co.*, 3 L. T. (N. S.) 850; 30 L. J. 148, Q. B., show that in his view, at any rate, a company would be responsible for the arrest by their police of persons, supposing the arrest was wrongfully effected. Can it be said that if the police whom they employ conduct a prosecution in the performance of their duties as officers of the company, it is not done in the scope of incorporation of the company? The company take to themselves, as a necessary part of their business, the protection of property which is intrusted to them as common carriers and otherwise. In my view it is within the scope of their incorporation, and is not like a thing entirely outside the objects of their business. It is a thing which, taking into account the nature of their business, they could not reasonably do without, and do not do without. If so, it seems to me I am bound to hold that the company may be responsible for malicious prosecution."

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

PEOPLE EX REL. FRANCIS V. COMMON COUNCIL OF TROY.

(78 N. Y. 33.)

Mandamus — to municipal corporation, to compel selection of proper newspaper for advertising.

A city charter required the common council to designate not to exceed four newspapers having the largest circulation in the city, in which the city advertising should be done. A designation was made, for a year, and acted upon, but the relator insisted and produced evidence that his newspaper had a larger circulation in the city than some of those designated. The proprietors of the other newspapers were not made parties. *Held*, (1) that the court could not by mandamus compel the designation of any particular newspapers in the first instance; (2) that it could not vacate the designation of any already made, nor add the relator's newspaper to those already designated; (3) that the year having elapsed for which the designation had been made, this remedy is not appropriate.

A PPEAL from order for *mandamus*. The opinion states the facts.

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R. A. Parmenter, for appellant.

Esek Cowen, for respondents. Parties contracting with municipal corporations are bound to take notice of the limitations imposed upon them by law, and any contract contrary to such limitations is void. *Donovan v. N. Y.*, 33 N. Y. 293.

RAPALLO, J. By section 3 of title 2 of the charter of the city of Troy (Laws 1873, ch. 813, p. 1216), the common council is required to "designate not to exceed four newspapers having the largest circulation in the city, in which the city advertising shall be done, only on the order of the common council." No mode of ascertaining which papers have the largest circulation is pointed out by the statute, and consequently that question is left open as one of fact, to be determined by the common council.

That body, at a regular meeting held on the 12th of March, 1878, designated, as official newspapers for the then ensuing year, four newspapers published in the city, viz., the Troy Daily Press, the Troy Morning Whig, the Trojan Observer, and the Troy Evening Standard. The proceedings of the meeting at which this designation was made are set forth in the moving papers on this application, but they do not disclose what evidence the common council then had before it of the extent of the circulation of the various newspapers, except that after the designation of papers had been made, an affidavit of one of the relators was presented, stating that he was one of the proprietors of the Troy Daily Times, which paper had the largest circulation of any daily newspaper published in said city; that deponent believed it had the largest circulation of any newspaper published in said city, but was positive that it was one of the four newspapers published in said city having the largest circulation in said city. With this affidavit a written communication from the relators was presented to the common council, calling attention to the before cited provision of the charter, and asking as matter of right that the Troy Daily Times be designated as one of the official papers of the city.

A motion to reconsider the designation was made after the presentation of these papers, but failed, and the relators thereupon applied to the Supreme Court for a peremptory mandamus, requiring the common council to designate theirs as one of the official newspapers. This application was based upon the minutes of the

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proceedings before set forth, and upon the minutes of the proceedings of the common council of the preceding year, which showed that at a meeting held on the 5th of April, 1877, a report of a committee on printing was received, setting forth the circulation in January, February and March, 1877, of various papers in the city of Troy. As this report related to the year 1877 it cannot be regarded as controlling the action of the common council of 1878. The application was further supported by an affidavit of the proprietor of the Trojan Observer, that he did not know what the circulation of that paper was for the two months prior to March 13, 1877; that it was issued once a week; that he did not know that its circulation was to exceed 2,000 copies. An affidavit of the manager of the Evening Standard, a daily paper, that its circulation was between 2,100 and 2,500 copies per day, on and before March 12, 1878. An affidavit of a clerk of the proprietor of the Troy Morning Whig, that the average circulation of that paper for the three months prior to the 12th of March, 1878, did not exceed 2,000 copies. An affidavit of the proprietor of the Troy Daily Press, that its average daily circulation during the three months next preceding March 13, 1878, was at least and more than 1,800 copies; and an affidavit of one of the relators, that their paper, the Troy Daily Times, had on the 12th of March, 1878, and for more than three months previous thereto, an average daily circulation in said city of upwards of 3,000, and that its total daily circulation exceeded 6,000, and that as he was informed and believed, the four newspapers designated by the common council were not the four having the largest circulation in said city. An affidavit of the clerk of the common council, that at the meeting at which the designation was made, no evidence was before the common council as to the circulation in said city of any of the newspapers published and circulated therein, except the before-mentioned affidavit presented on behalf of the Troy Daily Times, and that the common council refused to refer it to the city attorney to ascertain which were the four papers having the largest circulation, and no committee was appointed to ascertain that fact. An affidavit of one of the proprietors of a weekly newspaper called the Troy Northern Budget was also read, stating that at and prior to the 12th of March, 1878, it had an average circulation in said city at each issue of 6,000 and upwards, and was one of the four newspapers published in said city having the largest circulation therein; and that as he

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believed, the four newspapers designated were not the four having the largest circulation in said city.

In opposition to the application affidavits were read as follows: An affidavit of the president of the common council setting forth the political character of the newspapers published in the city. That the Troy Northern Budget was published only on Sunday, and that the papers designated on the 12th of March, 1878, had accepted the appointment and published the city advertising ever since. A further affidavit of R. A. Parmenter, Esq., was read, descriptive of the various newspapers published in the city, from which it appears that the Troy Daily Times was an afternoon paper issued in two editions, at half-past two and half-past four o'clock each week day, and the Troy Northern Budget was issued every Sunday morning. That the four papers designated by the common council on the 12th of March, 1878, each claimed to be an official paper, and the city advertising had since that time been published in those papers.

On this evidence the court at Special Term awarded a peremptory mandamus, commanding the common council at its next regular meeting to designate the Troy Daily Times as one of the official papers of the city of Troy.

Under the charter it was the duty of the common council to designate, not to exceed, four newspapers. It was therefore discretionary with it whether to designate more than one. The Troy Daily Times claims the legal right to be designated, alleging that it was the duty of the common council to designate the paper or papers having the largest circulation in the city, and that it answers that description, its daily circulation in the city being upwards of 3,000, while that of neither of the papers designated reaches that figure, that of the Evening Standard being placed in the affidavits at 2,100 to 2,500, the Morning Whig at 2,000, the Daily Press at 1,800 and upwards, and as to the Observer, a Sunday paper, its proprietor stating that he could not state what its circulation in the city was, and did not know that it exceeded 2,000. The Northern Budget, another Sunday paper, not designated, claimed a circulation at each issue of 6,000. In answer to this evidence it appeared that the Troy Daily Times issued two afternoon editions, and it was not claimed that it circulated 3,000 copies of each edition, and the presumption is that the 3,000 copies claimed to be circulated in the city were the aggregate of the two editions.

Assuming, however, that the evidence is sufficient to establish that the Troy Daily Times had the largest circulation in the city, and that the common council erred, or violated its duty in not designating it as one of the official papers, the case presents questions of importance, and of no small difficulty. The first is whether the legislative direction to the common council to designate the papers having the largest circulation vests in those papers a legal right to be employed, which can be enforced by mandamus at their instance, or whether it is a provision intended for the benefit, not of the newspapers, but of the public, to secure the most extensive and efficient advertising, and for a willful violation of which duty the common council are answerable to the public by indictment or otherwise and not to the newspapers. For an injury inflicted upon an individual, by neglect or violation of a public duty, the officer may be responsible both to the public and to the individual injured, and in case of the neglect of a duty enjoined by law for the protection of the persons or property of individuals, its performance may in general be compelled by mandamus at the instance of any person interested. But there is great room for doubt whether a statutory provision directing a municipal corporation to employ a designated class of labor, in order that the service may be well performed, vests in the persons answering the designation, a legal right to be employed, and gives them a standing in court, to compel the municipal body to employ them. But passing that, the further question remains, whether when the duty of selecting the persons to be employed is imposed by law upon a public body, and the question whether they possess the necessary qualifications is one of fact, to be determined by it, no particular mode of determining the fact being provided by law, and the public body has exercised this power, and made the selection, its action can be reviewed by mandamus, and it can be compelled by that proceeding to appoint particular persons, on their allegation that in fact they and not the persons actually selected possess the prescribed qualifications.

The office of the writ of mandamus is in general to compel the performance of mere ministerial acts prescribed by law. It may also be addressed to subordinate judicial tribunals, to compel them to exercise their functions, but never to require them to decide in a particular manner. It is not, like a writ of error or appeal, a remedy for erroneous decisions. *Judges of Oneida Common Pleas v. People*, 18 Wend. 92-99, and cases cited. This principle applies

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to every case where the duty, performance of which is sought to be compelled, is in its nature judicial, or involves the exercise of judicial power or discretion, irrespective of the general character of the officer or body to which the writ is addressed. A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment. The character of the duty, and not that of the body or officer, determines how far performance of the duty may be enforced by mandamus. Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be. This principle was applied to an assessor in *Howland v. Eldredge*, 43 N. Y. 457, 461, and is there recognized as an established and universal rule.

The duty of selecting the newspapers having the largest circulation in the city being imposed upon the common council, the power to determine as matter of fact which papers have the largest circulation is necessarily vested in that body.

The most that can be done by mandamus is to compel the common council to determine the question and designate the papers with reference to the statutory requirement; but I apprehend that it was not the province of the court to determine the question of fact in the first instance, and direct what particular paper or papers should be designated. This view was taken by the General Term in the First Department in the case of *People v. Brennan*, 39 Barb. 651. The mayor and comptroller of the city of New York were empowered by law to designate four papers having the largest circulation. The mayor and comptroller differed as to the papers to be designated, the comptroller insisting that the papers should be those having the largest daily circulation within the city, and the mayor contending that the largest circulation generally was intended. On proofs showing which papers had the largest general daily circulation, a peremptory mandamus was, on the relation of the mayor, granted at Special Term requiring the comptroller to unite with the relator in designating four papers named in the writ. The General Term agreed in the construction put upon the statute by the mayor, but said that as the determination which four papers had the largest daily circulation involved an adjudication upon the question of fact, they did not see upon what principle a mar-

damus could issue commanding the comptroller to unite in the designation of certain papers named in the writ. That the court could by mandamus compel the mayor and comptroller to meet and act in the matter, but not to act in a particular manner. The order was accordingly modified so as to direct the issuing of a mandamus requiring the comptroller to unite with the mayor in designating the four papers having the largest daily circulation generally. In the present case the evidence seems to have been quite satisfactory to the court that the relator's paper should be one of those designated, but if it was within the power of the court in this case to order the common council how to decide, or to designate any particular paper, it would be equally in its power to do so in cases involving nicely balanced and difficult questions; and the duty of designating official papers for every city in the State could be transferred from the officers charged by law with that duty, to the courts of justice.

If the common council have willfully violated or disregarded a duty enjoined upon them by law, they should be responsible in some form. But aside from the legal questions which have been considered, there are serious practical difficulties in the way of applying the particular remedy given by the order appealed from. The four papers designated have acted under their appointment. They are not parties to this proceeding, and their appointment would not be vacated by any judgment which could be rendered herein. There would in that case be five official papers when the law authorizes only four. It would be difficult to say that the claims of the papers appointed by the common council, for services rendered, could be successfully resisted by the city on the ground of any invalidity in their appointment. The effect of the mandamus would be to compel the appointment of a fifth paper without disturbing that of the other four. A very clear case should be made out to induce the court to subject the city to this additional expense, and we do not find the right of the relators to a mandamus so plain as to justify that course. We think that the view of the General Term in the First Department is the correct one, and that the most that should be done in such a case by mandamus would be on a proper application, and satisfactory proof that the statutory direction had been disregarded, to command the common council to meet and designate not exceeding four papers having the largest circulation in the city of Troy. But a mandamus in that form would not be

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appropriate now, as the year has elapsed for which the designation should have been made.

The orders of the General and Special Terms should be reversed and the application denied, without costs.

Orders reversed.

All concur.

FOWLER V. BUTTERLY.

(78 N. Y. 68.)

Insurance — life — assignment in fraud of wife.

A husband procured an insurance upon his life for the benefit of his wife, and delivered her the policy. Afterward, without consideration, and without any design to part with her property therein, but by the undue influence and control of her husband, she was induced to execute an assignment of the policy, without any knowledge of the purpose or purport, to a third person, who assigned it to a fourth, and these assignees paid the premiums. In an action on the policy, wherein the wife was made a party by order of interpleader, *held*, that she was entitled to the amount of the insurance, independent of the question whether the policy was assignable under the statute.

ACTION on a policy of life insurance, originally brought against the insurer, the widow of the insured being afterward substituted as defendant, the amount of the policy being paid into court by the insurance company. The policy insured the life of Butterly "in the amount of \$5,000, until the 6th day of September, in the year 1882, or until his decease in case of his death before that time, and the said company do hereby promise and agree to and with the said assured well and truly to pay, or cause to be paid, the said sum insured to the said insured, within ninety days after the termination of this assurance as aforesaid, or in case he shall die before that time, then to Henrietta Butterly, wife, if living, otherwise to Alice V. Butterly, daughter of the said assured." Butterly paid the premiums to October 13, 1872, and on that day executed and delivered an assignment of the policy to McCormack, and also the following paper :

"In consideration of the sum of one dollar, to us in hand paid by Joseph E. McCormack, the receipt whereof is hereby acknowledged, we, Henrietta (wife) and Alice V. Butterly (daughter), do

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hereby sell, assign, transfer and set over unto the said Joseph E. McCormack all our right, title and interest in the policy of insurance on the life of Nicholas Butterly issued by the North American Life Insurance Company, and numbered 11,994.

Dated NEW YORK, *October* 13, 1872.

“HENRIETTA BUTTERLY,
“ALICE V. BUTTERLY.”

Thereafter the premiums were paid by McCormack, until he assigned the policy to the plaintiff, and then the premiums were paid by plaintiff, or by McCormack on his account. The court found, as matter of fact, that the paper signed by Mrs. Butterly “was signed by her without any knowledge of its purpose or purport, without any consideration passed to her for so doing, and without any intention on her part to divest herself of any property or right, or of any interest, in said assurance, and that her signature thereto was procured from her by the exercise, on the part of her husband, of undue influence and control, amounting to compulsion;” “and that it was inoperative and void, as an assignment of the wife’s interest in the policy. Butterly died in 1875. The plaintiff had judgment below.

C. Van Santvoord, for appellant. In absence of evidence of fraud or imposition the presumption of law is that a party to a writing read it, or was otherwise informed of its contents, or willing to assent to its terms without reading it. *Grace v. Adams*, 100 Mass. 507; s. c., 1 Am. Rep. 131; *Chapman v. Rose*, 56 N. Y. 137-141; s. c., 15 Am. Rep. 401; *Rexford v. Rexford*, 7 Lans. 6. A wife has capacity to assign her interest in a policy of insurance in concurrence with her husband by writing, indicating her intention to do so. *Yale v. Dederer*, 18 N. Y. 265; 22 id. 450-452; 2 Bish. on Marr. Women, §§ 479, 480; *Barry v. Eq. L. Ass. Co.*, 59 N. Y. 588; *Stillwell v. Mut. L. Ins. Co.*, 72 id. 388-391. The covenant in the policy being with defendant’s husband, as the assured, the legal title and interest was in him, and no suit could be brought at common law upon it, except in his name, or that of his executors or administrators. 1 Chit. Pl. 3. Any interest of defendant could have been defeated by her husband by a release or assignment for a valuable consideration. *Draper v. Jackson*, 16 Mass. 476, 482, 486; 2 P. Wms. 497; *Sanford v. Sanford*, 45 N. Y. 723; *Schuyler v. Hoyle*

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5 Johns. Ch. 196; 2 Kent's Com. 137. This right is not affected by the acts for the more effectual protection of the property of married women. Laws 1848, chap. 200, § 3; Laws 1849, chap. 375; Laws 1860, chap. 90, §§ 1-8; Laws 1862, chap. 172; *Towle v. Towle*, 114 Mass. 167. The assignment of the policy to McCormack for a valuable consideration, without reservation, was an effectual transfer. *Jones v. Gibbon*, 9 Ves. 411; 2 Kent, 137.

Henry W. Johnson, for respondent.

MILLER, J. The policy which constitutes the subject of controversy in this action was issued to assure the life of Nicholas Butterly, "until the sixth day of September, in the year 1882, or until his decease, in case of his death before that time." In the latter event before the time named, the insurance company promised to pay the amount insured to "Henrietta Butterly, his wife, if living, otherwise to Alice V. Butterly, daughter of the assured." It will be seen that the policy was not alone for the benefit of the husband, but contained two separate and independent provisions. One of these was for his benefit, and conferred upon him absolute authority to receive the amount insured, if he remained alive until the time named and the policy was then in force; and the other for the benefit of the wife, if she survived him, or otherwise of the daughter. In case of the death of the assured, the wife or daughter became thereby vested with the sole right to collect and receive the money mentioned in the policy. The payment of the premium was made and the policy was obtained having these objects in view. The husband alone could collect the policy, if alive at the time of its expiration; otherwise it insured to the benefit of the wife, in case she survived her husband, or of the daughter as provided. The fact that the covenant in the policy was with Butterly, as the assured, and the legal title and interest was in him, if he lived until the time named, does not establish an intention to keep control of the policy, otherwise than as specified, or deprive the wife of the right which she had by virtue of the same. Nor was there any such retention of possession, or failure to deliver the policy by the assured, as indicated a design on his part to assume the absolute ownership of the same. It was delivered to the wife and placed where both herself and her husband had access to it; and even if we may assume there was no actual delivery, this omission

is not conclusive, for the reason that the language of the policy was such that the husband might properly retain it in his own possession and for his own benefit as long as he lived, prior to the time of its expiration in 1882. His possession was the possession of the wife; and the general rule, that where there is a gift there must be an actual delivery, therefore has no application. The policy itself shows the intention; and no argument is to be derived from a failure to surrender that in which the husband had a present interest before the wife had any absolute right to receive the money. Nor is it a legitimate inference that the provision in the policy for payment to the wife, in case of the husband's death, was only for her benefit, in case he should not dispose of the policy. Such a construction would be at war with the obvious meaning and plain import of the policy, and is not, we think, supported by any of the authorities cited by the appellant's counsel to sustain this position.

It is, we think, well settled that where the husband takes a security, or obtains a policy of insurance, in which the sum named therein is payable to himself and his wife, and she survives him, that the action survives to her, and the form of the security implies a design by the husband to benefit the wife. See *Sanford v. Sanford*, 45 N. Y. 726, and authorities there cited. In the case cited it was said that a delivery was not essential to perfect the gift.

The appellant's counsel claims that like other choses in action for a consideration running between husband and wife, for the benefit of the wife if she survives him, independent of the statutes relating to insurance of the life of the husband for the benefit of married women, the husband could defeat the interest of the wife by a release or assignment. We think that this rule does not apply where a policy of insurance is taken out payable to the wife in case she survives the husband; for in such case there is not only an express contract to pay to the wife upon the contingency mentioned in the policy, but the contemporaneous acts are usually of such a character as to indicate an intention to hold the same in trust for her benefit. Here it was, in fact, an executed trust, as the declaration of the husband to the company shows, for the benefit of the wife and himself, upon which the company promised to pay. The case at bar is not analogous to that of a bond or promissory note payable to the husband and wife jointly, where the same belongs to the husband,

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and the wife has no direct interest in it. She has an interest in the life of the husband which is insurable; and hence a promise to pay her is supported by a sufficient and valuable consideration.

The wife of Butterly having a direct interest in the policy in question, it could only be transferred, independent of the statutes relating to insurance upon lives for the benefit of married women, by an assignment duly executed by her. The judge upon the trial found that the instrument bearing date the 13th of October, 1872, executed by her, which purports to be an assignment of Mrs. Butterly's interest in the policy to McCormack, was executed without her knowledge of its purpose or import, and without any consideration and any intention on her part to divest herself of any interest she had in such assurance; and that her signature was procured by the exercise on the part of her husband of undue influence and control, amounting to compulsion. We think that the evidence was sufficient to sustain this finding. The testimony shows that Mrs. Butterly received no consideration for signing the paper, and she swears that if she did sign the instrument, it was done at the request of her husband, and because he asked her and she was afraid to refuse him. The proof also shows that she never read it, and that the subscribing witness to the assignment has a very imperfect recollection of the transaction. Perhaps the evidence was not very strong, but I think it was sufficient to warrant the conclusion of the referee which we have considered, and his finding should be upheld.

If the positions taken are correct, then the interest of Mrs. Butterly was unaffected by the assignment, and it is not necessary to consider whether the policy was within the spirit and objects of the legislation of this State relating to insurance of the husband's life for the benefit of the wife, and for that reason was not assignable.

The other questions raised have received due consideration, but none of them present any valid ground for a reversal of the judgment, and it should be affirmed.

All concur, except ANDREWS, J., absent.

Judgment affirmed.

CHAPIN V. DOBSON.

(78 N. Y. 74.)

Evidence — parol — to add guaranty to contract of sale.

It was orally agreed by A and B, that A should furnish B with certain machinery at a specified price, and that B should accept and pay for the same in a specified manner, and that A should guarantee that the machines should do B's work satisfactorily. The agreement was reduced to writing and signed, not including the guaranty. *Held*, that parol evidence was competent to add the guaranty.

ACTION on the following agreement:

“PHILADELPHIA, *July 9, 1868.*

“We agree to furnish John Dobson with the following machinery, on terms stated: 16 48-inch and 7 60-inch first Breaker Feeders, at three hundred dollars each, delivered at depot at Pawtucket, R. I., to be sent by steamer from Boston to Philadelphia, and allowance of three dollars to be made on each machine for freight. Man's time and expenses from Philadelphia to be charged extra for applying the machines. Terms cash on delivery, 5 per cent commission to be allowed on each machine, 5 60-inch and 4 48-inch to be delivered as soon as possible, the balance in thirty days thereafter.

“HARWOOD & QUINCY,

“*Agents for* CHAPIN & DOWNES.

“I agree to the above.

“JOHN DOBSON.”

Plaintiffs delivered some of the machines, and sued to recover the purchase-price, with damages for the defendant's refusal to receive the remainder.

The defendant offered evidence of an oral guaranty at the time of the execution of the contract, that the machines should be so made as to do the defendant's work well and satisfactorily, or in case of failure that they should be taken back and not be paid for. This evidence was received, and the defendant had judgment below

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M. W. Divine, for appellants. Parol evidence was not admissible to vary or add to the contract in this case. *Van Ostrand v. Reed*, 1 Wend. 424; *Wilson v. Deen*, 74 N. Y. 531; *Mumford v. McPherson*, 1 Johns. 414; 3 Am. Dec. 139; *Alsten v. Mech. Mut. Ins. Co.*, 4 Hill, 329; *Hovey v. Am. Mut. Ins. Co.*, 2 Duer, 554; *Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516; *Mayor of New York v. Brooklyn Fire Insurance Co.*, 3 Abb. Dec. 25; *Cleves v. Willoughby*, 7 Hill, 83; *Mayor of New York v. Price*, 5 Sandf. 542; *Mayer v. Moller*, 1 Hilt. 491; *Dodge v. Lambert*, 2 Bosw. 570; *Maguire v. O'Halloran*, Hill & Den. Supp. 85; *Clark v. Crandall*, 27 Barb. 73; *Williams v. Fitch*, 18 N. Y. 546; *Baird v. Gillett*, 47 id. 187; *Worrall v. Parmalee*, 1 Comst. 519; *Battin v. Healey*, 36 How. Pr. 346. The evidence was not admissible, on the ground that it established a collateral agreement. *Stevens v. Cooper*, 1 Johns. Ch. 425; 7 Am. Dec. 499; *Martin v. Rapelye*, 3 Edw. 229; *Erwin v. Saunders*, 1 Cow. 249; 13 Am. Dec. 520; *Wells v. Baldwin*, 18 Johns. 45; *Payne v. Ladue*, 1 Hill, 116; *Russell v. Kinney*, 1 Sandf. 34; *Brown v. Hull*, 1 Den. 400; *Frost v. Everett*, 5 Cow. 497; *Armstrong v. Munday*, 5 Den. 166; *Lewis v. Jones*, 7 Bosw. 366; *Brady v. Peiper*, 1 Hilt. 61; *Lowber v. Leroy*, 2 Sandf. 202; *St. Nich. Ins. Co. v. Merc. Mut. Ins. Co.*, 5 Bosw. 238; *Gridley v. Dole*, 4 N. Y. 486; *Lamatt v. Hudson Riv. Ins. Co.*, 17 id. 199; *Johnson v. Oppenheim*, 55 id. 293; *Van Bokkelen v. Taylor*, 62 id. 110; *Shaw v. Republic Ins. Co.*, 69 id. 292. The evidence was inadmissible on the ground that the contract was oral, and a part only was reduced to writing. *Potter v. Hopkins*, 25 Wend. 417; *Blossom v. Griffin*, 13 N. Y. 569; *Hutchins v. Hebbard*, 34 id. 24; *Beach v. Raritan, etc., R. R. Co.*, 37 id. 457.

Thos. Henry Edsall, for respondent.

DANFORTH, J. Two questions are presented by the appellant: one relates to the amendment of the answer. [Omitting this.] The other grows out of the admission of parol evidence offered by the defendant and by virtue of which he maintained his defense.

The contract on which the action is brought was made and was to be performed in Philadelphia. The parties may therefore be presumed to have entered into it with reference to the law there prevailing, but in the absence of any finding on the subject we must

assume that the *lex loci* is the same as the *lex fori* and determine the question before us according to the law of this State. *Monroe v. Douglass*, 5 N. Y. 447. The general rule requires the rejection of parol evidence when offered to cut down or take away obligations entered into between parties and by them put in writing. And the reason of the rule suggests its application and its limitation. "It would be inconvenient," says Lord COKE (5, 60, 26 a) "that matters in writing made by advice and on consideration and which finally import the certain truth of the agreement between the parties, should be controlled by an averment of the parties to be proved by the uncertain testimony of slippery memory." It does not apply therefore where the original contract was verbal and entire and a part only reduced to writing. *Potter v. Hopkins*, 25 Wend. 417; *Batterman v. Pierce*, 3 Hill, 171; *Grierson v. Mason*, 60 N. Y. 394. Nor has it any application to collateral undertakings. *Lindley v. Lacey*, 17 C. B. 578, and cases cited below. And these facts are always open to inquiry and may be proved by parol. *Filkins v. Whyland*, 24 N. Y. 344; Stephens' Dig. of Law of Ev., ch. 12, art. 90.

In *Jeffery v. Walton*, 1 Stark. 385, the contract for the hire of a horse was in writing, and it was further agreed by parol that accidents occasioned by his shying should be at the risk of the hirer. The horse shied and in consequence was injured. In a suit for damages it was held that parol evidence of that portion of the agreement which was not in writing was admissible. In *Batterman v. Pierce*, 3 Hill, 171, the action was upon a note given for wood on plaintiff's land. The defense was a verbal agreement made at the same time by plaintiff, that if any thing happened to the wood through his means or by setting fire to his fallow he would be accountable and would guarantee the purchaser against any damages in consequence of firing his fallow — the fallow was burned and the wood also — the defense prevailed, the court holding that the same result would follow, whether the contract of both parties had been written out, or whether all rested in parol without writing, saying "nor can it make any substantial difference that the undertaking of one party has been reduced to writing while the engagement of the other party remains in parol" — and to the objection that the defense contradicted the note said there was "nothing in it." "The defendants do not deny that they made such a contract as that on which the plaintiff seeks to recover, but they allege that the plaintiff

at the same time entered into an engagement on his part which has subsequently been broken ;” and the same may be said of the parties in the case in hand. The later cases of *Morgan v. Griffith*, L. R., 6 Ex. 70, and *Erskine v. Adeane*, L. R., 8 Ch. App. 756, explain the exception contended for and the principle upon which the ruling of the referee stands. They were considered by this court in *Johnson v. Oppenheim*, 55 N. Y. 280–293, and there said to be within the rule which allows a collateral agreement made prior to or contemporaneous with a written agreement but not inconsistent with or affecting its terms, to be given in evidence. Other examples to that effect are *Unger v. Jacobs*, 7 Hun, 220 ; *Bookstaver v. Glenny*, 3 T. & C. 248, affirmed in this court. The case before us may be added to the same class, without disturbing the decision of this court in *Wilson v. Deen*, 74 N. Y. 531, on which the appellants rely. There the plaintiff sought to cancel a lease upon the ground that the defendant failed to perform an oral agreement concerning a matter embraced in and covered by its terms. It was held that his case was directly within the general rule above stated, and the court advert to the fact that it was not claimed to be within the principle which upholds an oral or parol agreement when collateral to a written instrument contemporaneously executed, and say if it had been so claimed it would have been unavailing, as in such a case the only remedy would be an action for damages for the breach of the parol contract.

These distinctions are clearly pointed out in that case and are illustrated in *Angell v. Duke*, L. R., 10 Q. B. 174, and *Mann v. Nunn*, 43 L. J., C. P. 241. In *Angell v. Duke* the plaintiff was held entitled to recover damages for the breach by the lessee of an agreement similar to that in *Wilson v. Deen*, *supra*, the court holding it to be collateral to the demise and the case analogous to *Morgan v. Griffith*, *supra*. So in *Mann v. Nunn*, where a lessor promised that if the proposed lessee would take the lease of a house, he would put the house in a state fit for habitation, the promise was held to be collateral to the written lease and provable by parol evidence for the purpose of recovering damages for the breach of it. Whether the matter relied upon to reduce or defeat the plaintiffs’ claim is set up by answer as in *Spalding v. Vandercook*, 2 Wend. 432, and *Baltermann v. Pierce*, *supra*, and in the case at bar, or is made the subject of a cross-action, as in *Morgan v. Griffith* ; *Erskine v. Adeane* ; *Angell v. Duke* and *Mann v. Nunn*, *supra*, can make no

difference. The plaintiffs introduced in evidence a written instrument dated July 9, 1868. There is nothing upon its face to show that it was intended to express the whole contract between the parties. The referee finds that it does not contain it, and that the plaintiffs at the same time guaranteed to the defendant that the machines mentioned therein should be so made that they would do the defendant's work satisfactorily or they should not be paid for, and the defendant thereupon signed the writing in consideration of said guaranty. He also finds that the matters in writing and the above guaranty constituted the contract or agreement between the parties. It was within the province of the referee to make the finding above referred to (*Lindley v. Lacy*, 17 C. B. [N. S.] 578), and the evidence fully warrants it. The written contract related to machines thereafter to be manufactured by the plaintiffs, fixed the price at which they were to be furnished, the number, the place and manner of delivery, the time and manner of payment. Nothing else was provided for. These terms are to remain as written. Some of them impose obligations upon the plaintiffs and others on the defendants. The parol agreement was on the part of the plaintiffs. By it they guaranteed "that the machines should be so made that they would do the defendant's work satisfactorily." The writing specified machines described as "First Breaker Feeders," of certain dimensions. How they should work, and whether well or ill is not stated. If it had called for a machine to satisfy a required purpose, of which the plaintiffs had notice and which they had undertaken to supply, they would have been bound as a condition of the contract to supply an article reasonably fit for the purpose, and a warranty would have been implied that it was so. *Howard v. Hoey*, 23 Wend. 351; *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 518.

It is contended however by the appellants that this rule does not apply in this case, because a specific and designated machine was the subject of the contract. It may well be doubted, whether, in view of the findings of the referee and his refusals to find, the case is brought within the rule laid down in cases on which the appellants rely, but it is not necessary to determine that question, for the guaranty as made does not contravene the written contract, and is not inconsistent with it. If the fitness of the machine is implied the guaranty is in harmony with it and adds nothing; if it is not implied the paper contains no declaration that the machines shall

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be taken with all faults and insufficiencies, or at the defendant's risk. The parol evidence therefore contradicts no term of the writing nor varies it.

The written contract and the guaranty do not relate to the same subject-matter. The contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine. It is one thing to agree to sell or furnish machines of a specific kind, as of such a patent, or of a particular designation, and another thing to undertake that they shall operate in a particular manner or with a certain effect, or, as in this case, that they shall do the buyer's work satisfactorily. The first would be performed by the delivery of machines answering the description or the specifications of the patent; and whether they did or not conform thereto would be the only inquiry. As to the other, it in no respect touches the first, nor does it operate as a defeasance, but leaves it valid and to be performed, and the consequences of a breach of the guaranty are a recoupment or abatement of damages in favor of the defendant, and this is so, whether the contracts are in writing or not; for the guaranty is valid although not in writing, and the same rule must apply, for in either case the relation of the guaranty to the contract would be the same. In *Heyworth v. Hutchinson*, L. R., 2 Q. B. 447, the defendants bought of the plaintiffs a specific quantity of wool, then at sea but expected to arrive; "the wool to be guaranteed about similar to certain samples" referred to. The defendants refused to receive the wool alleging that it was not similar to the samples, and being sued for non-acceptance set up that fact as a defense. The court held it invalid, that the contract was for specific goods, and therefore the clause of guarantee was only collateral to the contract, and so the buyer could not reject the wool on the ground that it was not conformable to the sample, but his remedy would be either by a cross action on the guarantee or by giving the infirmity in evidence in reduction of damages. This case is in point. It seems plain both upon principle and authority that the plaintiffs' undertaking was collateral to the contract by which they undertook to furnish the machines, and that the referees committed no error in receiving the evidence objected to.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur.

FARMERS AND MECHANICS' NATIONAL BANK V. HAZELTINE.

(78 N. Y. 104.)

Bill of lading — special indorsement and delivery — wrongful diversion.

The plaintiff at Buffalo discounted a draft on B, on delivery, as collateral, by B's agent, of a bill of lading of wheat shipped to B at New York, the proceeds being used by the agent to pay for the wheat at Buffalo. On acceptance of the draft, the plaintiff delivered the bill of lading to B, with an indorsement to the effect that the wheat was pledged to it for payment of the draft, and was placed in B's custody "in trust for that purpose," and was not to be diverted to any other use until the draft was paid. B sold and delivered the wheat to C, but did not pay the draft. C knew of the bill of lading and the indorsement before his purchase. *Held*, that he was liable in an action for conversion of the wheat. (*See note, p. 531.*)

ACTION for conversion of a boat load of wheat.

Brown, at New York, ordered Sears & Daw, at Buffalo, an order to buy him a cargo of wheat, but provided no funds. According to the custom of the parties, Sears & Daw paid for the wheat by the discount, by the plaintiffs, of their time draft on Brown, it being agreed that it was to be secured by the wheat. Sears & Daw shipped the wheat by canal boat to New York, taking a bill of lading, running to: "Account and order Farmers and Mechanics' National Bank of Buffalo. Notify E. S. Brown, New York," and upon such discount delivered to plaintiff the bill of lading and insurance receipt. The plaintiff stamped the bill of lading as follows:

"To E. S. BROWN:

"The property mentioned in this bill of lading, with insurance on the same, is pledged to the Farmers and Mechanics' Bank of Buffalo as security for the payment of the accompanying draft for \$7,791.77, and the property is placed in your custody in trust for that purpose, and is not to be diverted to any other use until the draft is paid; and upon your accepting and paying the draft the claim of the bank will cease. Without recourse.

"F. SIDWAY, *Cashier.*"

And indorsed the draft as follows: "The documents hereunto annexed are to be delivered to drawee on acceptance." The draft

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was also indorsed by the plaintiff for collection, and with the bill of lading and insurance receipt immediately sent to a New York bank. Brown accepted the draft on presentment, and received the bill of lading and insurance receipt. When the wheat arrived in New York the carrier by the order of Brown delivered it to defendants, warehousemen, in store, in pursuance of an arrangement between Brown and one Atkinson, to whom Brown had sold it, defendants making an advance to pay the purchase price. Defendants afterward delivered the wheat to Atkinson on Brown's order. Before such advance and delivery, a copy of the bill of lading and of the indorsement were shown defendants. Brown failed before the maturity of the draft.

C. Van Santvoord, for appellants. The wheat having been delivered to Brown under circumstances showing an intent to pass the title, defendants, as *bona fide* purchasers, acquired a good title. *Woodley v. Brown*, 1 C. & P. 593-597; *Howes v. Ball*, 7 B. & C. 481; *Rawls v. Deshler*, 3 Keyes, 572; 4 Abb. N. Y. Ct. App. Dec. 12; *Smith v. Lynes*, 1 Seld. 41; *Wait v. Green*, 36 N. Y. 556; *Ballard v. Burgett*, 40 id. 314; *Fleeman v. McKean*, 25 Barb. 474, 477; *Dows v. Dennistoun*, 28 id. 393; *Paddon v. Taylor*, 44 N. Y. 371, 375; *Mowrey v. Walsh*, 8 Cow. 238; *Dows v. Nat. Bk.*, 1 Otto, 618; *Thames*, 14 Wall. 98; *City Bk. v. R. W., and O. R. R. Co.*, 44 N. Y. 136; *First Nat. Bk. Toledo v. Shaw*, 61 id. 283; *Henderson & Co. v. Comptoir Descompte de Paris*, L. R., 5 P. C. 253. Delivery of a bill of lading by the owner of the goods, showing a shipment for account of a transferee, and the indorsement and delivery of a bill of lading by one for whose account a shipment is made to a third party for a valuable consideration, transfers the legal title and property. *Dows v. Rush*, 28 Barb. 185; *Blossom v. Champion*, 28 Barb. 223; *Dows v. Greene*, 32 id. 490; 24 N. Y. 504-508. 638; *Lickbarrow v. Mason*, 2 T. R. 70; 1 H. Bl. 357; *Parker v. Patrick*, 5 T. R. 175; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 444, 445; *Gibson v. Stevens*, 8 How. 384-400; *Bank of Rochester v. Jones*, 4 Coms. 497; *Keyser v. Harbeck*, 3 Duer, 373; *Walter v. Rose*, 2 Wash. C. C. 283; *Nathan v. Giles*, 5 Taunt. 558, 573; *Morrison v. Gray*, 9 Moore's C. B. 484; *Mary Ann Guest*, 1 Blatchf. 358. Atkinson was not bound to inquire into any equities which attached to the title to the wheat. *Henderson v. Comptoir Descompte*, L. R., 5 P. C. 253. The diversion by Brown of the proceeds of the draft to other

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purposes than payment of the draft could not affect the purchaser. 1 R. S. 730, § 66; 3 R. S. (2d ed.), 586, reviser's note; *Graff v. Bonnett*, 31 N. Y. 9; *Campbell v. Foster*, 35 id. 361, 372; *Roosevelt v. Roosevelt*, 6 Hun, 31-44; affirmed, 64 N. Y. 654; *Locke v. Mabbett*, 2 Keyes, 457, 460.

Freeman J. Fithian, for respondent.

ANDREWS, J. The decisions of this court in the cases of this plaintiff against *Logan & Preston*, 74 N. Y. 568, and of the same plaintiff v. *Atkinson*, id. 587, are decisive of this appeal. The latter case was against the purchaser from Brown of the same cargo of wheat in question in this case, to whom the wheat had been delivered by the defendants in this case upon the order of Brown, from whom the defendants had received it in store. The judgment recovered by the plaintiff against Atkinson not having been collected or paid, this action was brought against the defendants for the conversion of the wheat. It is not claimed that the defendants stand in any better position than Atkinson or that they have any defense which would not have been equally available to him. Indeed it appears affirmatively that the defendants before they advanced upon the wheat to Atkinson or delivered it to him, saw a copy of the bill of lading and the indorsement thereon, and had actual notice thereby of the respective rights of the plaintiff and Brown by virtue of the bill of lading and the indorsement. In the case of Atkinson it did not appear that the latter had actual notice of the contents of these documents at the time of purchase.

The cases mentioned were determined by this court upon the legal construction of the bill of lading and the special indorsement in connection with the extrinsic facts which in all material respects are identical with the facts in this case. The court held that the plaintiff, by virtue of the transaction with Sears & Daw, and the transfer to it by them of the bill of lading, became the legal owner of the wheat, and that the delivery of the bill of lading to Brown with the special indorsement of the plaintiff thereon did not vest in him the title to the property or confer upon him authority to sell the wheat, but that Brown by the transaction was simply vested with the possession under a trust to hold the wheat for the plaintiff, and that the plaintiff's title could not be divested by any act of Brown until the actual payment of his acceptance.

The controversy turns upon the legal effect of the delivery of the

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wheat to Brown under the terms of the special indorsement of the bill of lading. If the delivery under this instrument vested the title to the property in Brown, and the trust contained in the instrument was a trust affecting the proceeds to be realized from a sale, then, upon well-settled principles, a *bona fide* purchaser from Brown would acquire a good title which would not be divested or disturbed by a misappropriation by Brown of the proceeds of the sale in contravention of the trust. But this construction of the instrument was rejected by the court in the former cases after full consideration. The court did not question the well established doctrine that a general indorsement and delivery of a bill of lading vests in the indorsee the title to the bill and the property thereby represented, so as to enable him to transfer to a *bona fide* purchaser, for value, a good title, whatever secret arrangement may have existed between the original parties. But the court in the cases referred to decided that the indorsement in question did not have the effect of a general indorsement, and that in connection with the special contract overwritten it showed that Brown's right was simply that of depositary of the grain with no authority to sell until the draft should be paid, and that when the sales in question were made Brown had no title and could confer none.

We have attentively considered the able argument of the counsel who represented the defendants on this appeal, but after full consideration we adhere to the conclusions reached in the former cases.

The judgment should be affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—In *Farmers and Mechanics' Nat. Bk. v. Logan*, 74 N. Y. 568, the court made the following review:

"The case of *Turner v. Trustees of the Liverpool Docks*, 6 Exch. (Welsby, Hurl. & Gordon), 543, is pertinent. Merchants in Liverpool sent orders to merchants in Charleston, to ship cotton on account of the former, in their vessel, for her voyage to Liverpool. They in Charleston bought cotton, and shipped it in that vessel. They took a bill of lading 'to order or to our assigns,' and indorsed it 'deliver the within to the bank of Liverpool or order.' They drew drafts on the merchants in Liverpool, and delivered the bill of lading to a bank in Charleston and on security of it, sold the drafts to the bank, and used the avails to pay for the cotton, or to reimburse themselves for advances therefor. They in Liverpool did not pay the bills. When the cotton reached that port, the question arose, to whom did the cotton belong? It was held that the property in it did not vest absolutely in them in Liverpool, notwithstanding the delivery of it on board their ship to their

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servant, the master; but that they in Charleston, by the terms of the bill of lading, had reserved to themselves a *jus disponendi* of the cotton, and that they had not divested themselves of their property in or possession of the goods; and that having bought the cotton with their own funds on their own credit, they retained their property in it until payment was made for it by the men in Liverpool. See in acc. *The Frances*, 9 Cr. 183. There are facts in the case cited (6 Exch., *supra*), not stated by us, which make it a stronger case for the principals in Liverpool than the one in hand is for Brown. It was decided in the Exchequer Chamber, after elaborate argument and full consideration. It has been since recognized and approved as sound and authoritative. See *Mirabita v. Imp. Ottoman Bank*, L. R., 3 Exch. Div. 161. The conclusion reached in it satisfies our judgment; the principle declared in it is sound, and applicable to and decisive of the point we are now considering.

"We think that the adjudications, on this side of the water, are to the same end. There have been repeated adjudications in this court, whereby the legal effect of a bill of lading has been determined, when it contained some special clause or notation, or had upon it an indorsement which pointed out a particular person, as the one on whose account the property named in it was to be carried and delivered. *Bank of Rochester v. Jones*, 4 N. Y. 497; *Duce v. Perrin*, 16 id. 335; *Mechanics and Traders' Bank v. Farmers' and Mechanics' Bank*, 60 id. 40; *First National Bank of Toledo v. Shaw*, 61 id. 283; s. c., on second appeal, 69 id. 624; *Marine Bank of Buffalo v. Fiske*, 71 id. 353; *Bank of Commerce v. Bisell*, 72 id. 615. The bill of lading of goods, thus affected, *prima facie* confers upon the person in whose favor it is issued, or to whom it is transferred, the legal title to them. 4 N. Y. *supra*. That result is, though the transaction is not intended to give the permanent ownership, but to furnish a security for advances of money or discount of commercial paper, made upon the faith of it. Third persons, dealing with property thus shipped, though acting in good faith, in the regular course of business, and paying value, are affected by the terms of the bill of lading, are bound to look into it, and are chargeable with a constructive notice of the contents of it. In the case in hand, had the appellants asked for the bill of lading, and looked into it, they would have seen that the property described in it was in the possession of Brown, with a special and restricted right over it, and that they could not deal with it safely, until there had been a compliance with the condition attached to that possession. *City Bank v. R. W., and O. R. R. Co.*, 44 N. Y. 138. And as they were chargeable with a constructive notice of the contents of it, there is the same legal result as if they had looked into it."

 PEOPLE V. SECURITY LIFE INSURANCE AND ANNUITY CO.

(78 N. Y. 114)

Insurance — insolvent company — rights of holders of unmatured policies and death-claims.

An insolvent life insurance company, discontinuing business and failing to carry its policies, is liable to policy-holders in damages for breach of contract; the policy-holders are creditors for the value of their policies at the date of the dissolution of the company; and the claims of holders of unmatured policies are not to be postponed to death-claims maturing before the dissolution.

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APPEALS by policy-holders from an order confirming the report of a referee, to whom, upon petition of the receiver of Security Life Insurance and Annuity Company, it was referred, "to take proof and report to this court the names of all persons entitled to participate in the fund in the hands of the said receiver, and the respective amounts of their net claims against said fund;" also to "take proof and report to this court, with his opinion, as to what disposition shall be made of any and all premium notes in the hands of said receiver;" and also to "take proof and report to this court, with his opinion, whether any claims against said receiver are entitled to preference in payment, and if so, in what order, and the names of the claimants entitled to such preference;" also to "take proof and report to this court, with his opinion, as to what dividend should now be declared among the creditors of said Security Life Insurance and Annuity Company from the fund in the hands of said receiver." The facts appear in the opinion.

Robert Sewell, for holders of death claims, appellants. 'The policy-holders were partners in the company, and were liable for its losses to the extent of the premiums contributed. *Mygatt v. N. Y. Co.*, 21 N. Y. 54, 61; *In re At. L. Ins. Co.*, 16 Alb. L. J. 453; *Grissil's case*, L. R., 1 Ch. 528; *Kean v. Johnson*, 1 Stock. 401; Coll. on Part., 641, §§ 8, 1079; *Koehler v. B. R. Co.*, 2 Black. 715; Ang. & Ames on Corp. 591; Biss. on Part., 248; Story on Part., §§ 2, 107-109, 254, 255; *Oakley v. Aspinwall*, 2 Sandf. 7; *Penny v. Black*, 9 Bosw. 310; *Man. B. Co. v. Sears*, 45 N. Y. 797; s. c., 6 Am. Rep. 177; *Ont. Bk. v. Hennessy*, 48 id. 545; *Bullard v. Kinney*, 10 Cal. 60; *Schimpf v. Lehigh V. Co.*, 7 Ins. L. J., 665; *In re European Co.*, 5 Big. Ins. 718; *N. Y. L. Ins. Co. v. Statham*, 3 Otto, 24. 'The policy-holders were not creditors of the company, within the meaning of the Revised Statutes, respecting proceedings against corporations in equity. *King v. Ac. L. Ins. Co.*, 3 C. B. (N. S.) 151; 5 Big. Ins. 635; *Belknap v. N. Am. L. Ins. Co.*, 11 Hun, 282; *Day v. Conn. L. Ins. Co.*, 45 Conn. 480; s. c., 29 Am. Rep. 693; *Trenton Co. v. McKelway*, 1 Beas. 133; *Comm. Co. v. Mass. Co.*, 112 Mass. 116; 119 id. 45; *Mut. Ben. L. Ins. Co. v. Hilyard*, 8 Vr. 444; s. c., 18 Am. Rep. 741. A member of a corporation cannot sue it at law for something connected with the very contract which makes him a member. *Culbertson v. Nav. Co.*, 4 McL. 544. All debts of the company must be

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paid before other claims shall have any of the fund distributed to discharge them. Laws 1867, chap. 708; *Day v. Conn. L. Ins. Co.*, *supra*. If the policy-holders were entitled to a return of premiums paid in advance, only the proportion unexpired of the period paid for in advance could be returned. *N. Y. L. Ins. Co. v. Statham*, 3 Otto, 93; *McKenty v. Uni. L. Ins. Co.*, 4 Big. Ins. 133; *Rawls v. Am. Ins. Co.*, 27 N. Y. 282. The policy-holders who had paid in notes were liable thereon for losses to the full extent of the notes. *Osgood v. Ogden*, 4 Keyes, 70; *Conyland v. N. C. Co.*, Phill. Eq. (N. C.) 341; *Farmer's Bank v. Maxwell*, 32 N. Y. 579; *Hope M. Ins. Co. v. Perkins*, 2 Abb. Ct. App. 383; *Home v. Allen*, 1 Sand. 171; *Browner v. Appleby*, 1 id. 158; *Deraismes v. Merchants' Co.*, 1 N. Y. 371; *Bangs v. Gray*, 12 id. 477; *White v. Havens*, 5 Abb. Ct. App. Dec.; *Cooper v. Shaver*, 41 Barb. 151; *Jackson v. Roberts*, 31 N. Y. 304; *Howland v. Meyer*, 3 id. 290; *Brown v. Crake*, 4 id. 51; *Cruikshank v. Browner*, 11 Barb. 228; *Lawrence v. Nelson*, 21 N. Y. 158; s. c., 4 Bosw. 240; *Vanatta, Atty.-Gen., v. New Jersey Co.*, 31 N. J. Eq. 15; *Mygatt v. N. Y. Co.*, 21 N. Y. 57; Laws of 1849, ch. 308; Laws of 1836, 42 and 89, special charter; Laws of 1838, ch. 236, id.; Laws of 1840, p. 262, United I. Co.; Charter of Mutual Life Ins. Co.; Laws of 1842, ch. 246; *White v. Haight*, 16 N. Y. 321.

Horace W. Fowler, for appellant Gilliland.

Raphael J. Moses, Jr., for appellants Kyler and others.

Hamilton Cole, for receiver.

William Barnes, for respondents.

EARL, J. The defendant was dissolved and a receiver was appointed of its assets under section 17 of the act, chapter 463 of the Laws of 1853. It was organized under the same act, and by section eleven of the act it was made subject to all the provisions of the Revised Statutes in relation to corporations, so far as the same were applicable, except as otherwise specially provided in the act. No provision was made in the act regulating the conduct of the receiver in such a case, or the distribution of the assets or any of the proceedings subsequent to the appointment of the receiver. All such matters were left to be regulated by the provisions of the Re-

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vised Statutes and the practice of courts of equity ; and to those provisions and that practice we must look, so far as needful, for the solution of the questions presented for our consideration.

[Omitting a minor question.]

Second. It is claimed upon the part of some of the holders of unmatured policies that they are entitled to have refunded to them a *pro rata* portion of the premiums paid by them, before the payment out of the assets of any other creditors ; and this claim is based upon the following provisions of the Revised Statutes (2 R. S. 470, § 75) : “ If there shall be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk ; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed cancelled and discharged as against such receivers.” Section 77 : “ The receivers shall retain out of the moneys in their hands a sufficient amount to pay the sums, which they are hereinbefore authorized to pay, for the purpose of cancelling and discharging any open or subsisting engagements.”

This claim has been disallowed by the court below and, we think, properly.

By the act of 1853, the corporations organized under it were made subject to such provisions of the Revised Statutes as were applicable ; and the sections above cited are not applicable to life insurance companies. They can apply only to fire and marine or other insurances having a definite term to run. In the case of a running or unmatured life policy, the time which shall remain of the risk cannot be known. If these sections apply, then the unjust result will follow that the more one has paid upon one of these policies, the less he will receive ; and the one who has paid the least, and has the longest expectation of life, will receive the most. These sections are applicable only to cases where the insurance is an indemnity for some certain risk ; and in such cases, the amount paid for the indemnity may be apportioned. If the risk has been car-

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ried half of the time, half of the premium has been earned ; and the nearer the risk has been carried to the end of the time, the more of the premium has been earned, the less valuable the policy has become to the assured, and under these sections, therefore, less would have to be refunded. But life insurance is not an indemnity against any risk, but an absolute engagement to pay a sum certain at the end of a definite or indefinite time. In such cases, the policy becomes more valuable as its end is approached ; and any such settlement as could be made under these sections would be quite absurd.

But the claim is made on the part of some of the appellants that the holders of unmatured policies are not creditors, but partners in the company ; and that they are therefore not entitled to share in the assets until after payment of the death claims and of other creditors.

The argument that they are to be treated as partners is quite ingenious, but, I think, clearly unsound. The statute of 1853, to which this company owed its creation, made it a corporation. It had a capital stock of \$110,000, divided into shares, which was contributed not by policy-holders, but by the stockholders. Its business was managed by directors chosen by the stockholders. No policy-holder, unless a stockholder, had any voice in any way in the election of its officers or the management of its business. Every policy-holder in such a company enters into engagements with the company, and not with any other policy-holder. He pays the premiums upon his policy, not to make a fund to insure others, but solely as a consideration of his own insurance. The company receives the money as its own, and holds it as his own, and may do with it what it will, except as it is restrained by some statute. It is wholly immaterial to the assured what the company does with the money, provided it remains solvent until the maturity of his policy. It is true that the company relies upon all the premiums paid to carry on its business ; and that it could not discharge its obligations out of its capital alone. The law requires that it shall keep and have at all times assets invested in a certain way, sufficient to meet all its liabilities — that is, that it shall keep solvent. But they who pay their money for insurances are no more jointly interested, or in any sense partners, than the depositors in a bank. The depositors swell the assets of the bank and also its liabilities, and they have a common interest that the bank shall keep its funds so as to be able

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to discharge its liabilities; and that is all. It is true that when such a company insures one, it takes into account the fact that it has insured and is to insure many others, and that fact has a bearing upon the amount of premium charged; but the premium is after all solely for the particular insurance. The fund produced by the payment of all the premiums does not in any sense belong to the policy-holders, but belongs exclusively to the company; and the policy-holders are interested in it in the same way only that the creditors of any other corporation are interested in its funds.

There is nothing in the statute of 1853 which makes the policy-holders members of the company. Section ten of that act provides that the company may sue any of "its members or stockholders," and that any of the "members or stockholders" may sue it. The words "members" and "stockholders" here mean the same person. Every member of such a company is a stockholder, and every stockholder, a member. The provision is wholly unnecessary and has no significance. It is a superfluous provision frequently found in similar statutes.

There is a provision in the charter of this company that the stockholders may receive a semi-annual dividend of not exceeding three and one-half per cent, and that, at intervals of three years, the net profits, after paying such dividends, shall be paid, twenty per cent to the stockholders, and eighty per cent to the policy-holders. It is claimed that this sharing in the profits makes the policy-holders partners. These profits were not to be paid to them as the income of any business which they were carrying on or in which they were interested. They were the profits of the company in its business. The policy-holders could make no profits. They could never receive back more money than they paid, and never as much, interest upon their payments being taken into account; and hence any dividend to them under this charter could in no proper sense be called, as to them, profits. As to the company, they might be profits earned by good management and too large premiums—profits earned solely out of the stockholders. These so-called profits, when divided, would be simply an equitable adjustment of premiums paid. If such profits should exist, they would show that the company had been exacting more premiums than were just and fair; and the excess was to be refunded in this mode.

This novel claim of partnership is not sustained by any authority, and even in the case of a mutual life insurance company was

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repudiated by Judge ALLEN in his opinion in *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610; s. c., 10 Am. Rep. 522.

But the further claim is made that these policy-holders although not partners, are not creditors, and as such entitled to share in the assets of the company on a footing of equality with other creditors; and this claim must now be somewhat examined.

It is true that there is no provision in the policy that any portion of the premiums shall be refunded. There is an agreement on the part of the company that upon the payment of the annual premiums, it will pay the stipulated amount at death. There is also the agreement necessarily implied, that it will receive the annual premiums and carry the insurance to its term. The annual premium is not paid solely for an insurance for the year in which it is paid, but as stated by Mr. Justice BRADLEY in *New York Life Insurance Company v. Statham*, 93 U. S. 24, each premium is part consideration of the entire insurance for life; or as stated by Mr. Justice STRONG in the same case, the assured, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whichever of these be the true theory, the agreement is necessarily implied that the company will receive the premiums and keep the policy in life; and this is not all. The company is the creature of statute, and its mode of action for the protection of the policy-holders is regulated by statute. From the nature of the case, the agreement must also be implied that it will obey the statute, the law of its creation and of its existence; that it will do its business as required by the statute; that it will properly keep and invest its funds, and be in a condition at all times as the statute requires to discharge all its liabilities. Therefore when it violates the law, fails to keep on hand funds required by law and becomes insolvent, discontinues business, makes it impossible for the assured to pay premiums, and fails to carry the policies, it has broken its engagements with its policy-holders and becomes liable to them on account of such breach. The policy-holders then have a claim for damages, just as they would have if while doing business it had without just cause refused to receive the payment of premiums and to continue the policies in life; and to this effect have, I believe, uniformly been the decisions. *N. Y. Life Ins. Co. v. Statham*, *supra*; *Fischer v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161; *Bell's case*, L. R., 9 Eq. 706; *Cook's case*.

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id. 703; *Holdich's* case, L. R., 14 Eq. 72. These policy-holders are therefore in the same position as any other persons would be who had running contracts of value with the company, which it had broken,—claimants for damages.

What is the damage sustained by each of these policy-holders? Clearly the value of the policy which has been destroyed. When such value has been ascertained, the true measure of damage has been arrived at. But the difficulty is to determine the value. In any given case, the precise value cannot be ascertained. If the time of death were certain and the rate of interest determined, there would be no difficulty. Then the present value of the amount to be paid at death, diminished by the amount of the present value of all the premiums to be paid, would give the value. But the time of death is uncertain, and hence the present value of a running policy must always be somewhat speculative and uncertain. Yet, as in all cases of difficulty, the courts charged with the duty of ascertaining value must take the best light the nature of the case admits. To persons of a certain age there is an average expectancy of life; and this is shown in certain tables used in the business of life insurance showing the expectancy of life for persons of all ages. These tables are built upon long and varied experience and are deemed sufficiently reliable, in the absence of a better basis, for the guidance of the courts, of public officers and of insurers. One of such tables is annexed to the act, chapter 623 of the Laws of 1868, and that is the table used by the referee in this case. As before stated, the annual premiums are not the consideration of insurance for the year in which they are paid; for they are equal in amount, whereas the risk in the early years of life is much less than in the later. Therefore during the early years, the assured has paid more than sufficient to carry the risk during those years; and this excess is to aid in carrying the risk during the later years when the annual premiums would be insufficient for such years. This excess is called the equitable value of the policy and goes to make up what is called the reserve fund. This reserve, together with the same annual premiums, ought to be sufficient to enable the assured to obtain a policy for the remainder of his life for the same amount in another solvent company, and hence may be taken as the measure of present value, assuming that there has been no change in the value of his life since his insurance, except that caused by the efflux of time. But the health of a policy-holder may since his insurance have be-

come so impaired that his life is not now reinsurable, and hence in his particular case the value to be arrived at upon this basis would not be the measure of his damage. But yet I am inclined to think that even in such cases the basis would have to be generally adhered to, for the reasons stated by Lord CAIRNS in *Lancaster's* case, to be found in a note to *Holdich's* case above cited, because it would be wholly impracticable in the cases of thousands of policy-holders to determine the state of health for re-insurance of each policy-holder, compared with his state of health at the date of his policy. The inquiry would be so much a matter of speculation and uncertainty, and would lead to so much litigation, delay and expense that it would be practically impossible, it seems to me, to administer the assets of an insolvent company in that way. But what the general rule in such a case should be it is not important to determine now, as all these lives must be assumed to be in a normal state, as there is no proof as to the precise state of any one. As I understand it, the referee in this case adopted the basis mentioned, with the aid of the table above referred to, in estimating the values of the running policies at the date of the dissolution of the company; and in this I cannot perceive, from any evidence in the case or any information furnished by the briefs of learned counsel, that any error was committed; and I therefore conclude that these policy-holders are creditors of the company for the present values of their policies as thus estimated.

Third. The receiver holds a large amount of premium notes given by policy-holders in part payment of premiums; and the referee held that the amounts due upon such notes should be offset against the value of the policies, and that the dividend should be declared and paid upon the balance. In this there was no error. A policy-holder who has given such a note is a creditor only for the balance, after deducting such note from the amount due him for the value of his policy; and in holding that the dividend was to be made upon such balance, the referee has followed the rule laid down in the statutes and the decisions. 2 R. S. 47, § 36; id. 464, § 42, and p. 469, § 68; *Matter of Globe Ins. Co.*, 2 Edw. Ch. 625; *Osgood v. De Groot*, 36 N. Y. 348.

Fourth. Our attention is called to the case of an unmatured paid-up policy, and the claim is made that it should be treated differently from unmatured policies upon which annual premiums are payable. But there can be no difference. The value of such a

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policy must be computed in the same way as the others. It is the balance of the premium, ascertained by the rules used in such cases, necessary to carry the policy to maturity; or in other words, the unearned premium, which is called the reserve.

[Omitting a minor question.]

Sixth. The claim is made that the death claims which matured before the dissolution of the company should be paid before the claims of the holders of unmatured policies; and I think this claim was properly disallowed by the referee. Upon the assumption which we have shown to be a proper one — that the holders of such policies are creditors of the company — this claim has no basis to rest on. No decision has ever been made, that I can find, giving the preference claimed. The death claimants have no lien, legal or equitable, upon the funds of the company; and without such lien, they can have no preference. It is the rule of the statute, as well as of equity, that all the creditors of such a corporation, when it becomes insolvent, shall share in its assets in proportion to their claims. 2 R. S. 47, § 36; p. 466, § 48; p. 471, § 79. The fact that one claim is matured gives it no preference over others not matured. There is nothing in the nature of life insurance that gives the preference. One who has paid his money to carry a policy to maturity has no better right or greater equity than another who has paid his money to carry a policy toward maturity. The holder of a running policy has paid his money not to make a fund to pay death claimants, but for insurance upon his own life. He expects the benefit of the money he has paid, either by receiving the amount insured at the maturity of his policy, or damages for the breach if the company fails to carry his policy to maturity. To the extent of such damage he is on the same footing, legal and equitable, with every other creditor. The opinion of Chancellor RUNYON in the case of *Vanatta v. N. J. Mut. Life Ins. Co.*, 31 N. J. Eq. 15, with a copy of which we have been furnished, is not in point, as that was a mutual company, in the charter of which the holders of running policies were liable to assessment to pay death losses.

[Omitting a minor question.]

I have now considered all the allegations of error brought to our attention by the various appeals; and my conclusion is that the order appealed from should be affirmed, except as to the appellant Gilliland; and that as to him it should be modified to conform to the views above expressed. Costs in this court must be allowed to

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the receiver and to the appellant Gilliland, to be paid out of the assets, but to none of the other parties.

Ordered accordingly.

All concur.

PEOPLE V. MERCHANTS AND MECHANICS' BANK.

(78 N. Y. 269.)

Bank — insolvent — issue of draft for depositor's check.

The C. N. Bank cashed a check on the M. and M. Bank, and sent it for payment; the latter bank sent the former its draft for the amount, charged the check to the drawee's account, which was good, and returned him the check as paid. Two days afterward the M. and M. Bank failed, and was placed in the hands of a receiver. On an application by the C. N. Bank to have the receiver pay the amount of the draft to it, *held*, that the transaction was a simple shifting of indebtedness by the M. and M. Bank, and did not impress any trust on the drawer's funds in its hands.

A PPEAL by Chemical National Bank of New York from an order denying petition for an order directing the receiver of the Merchants and Mechanics' Bank of Troy to pay to petitioners the amount of a check out of the assets in his hands.

The Troy and Boston Railroad Company kept a deposit account with the Merchants and Mechanics' Bank of Troy, against which it weekly drew checks payable to the New York Central and Hudson River Railroad Company, which were deposited in the Chemical Bank of New York city. The custom was for the Chemical Bank, on Saturdays, to mail such checks to the Merchants and Mechanics' Bank, which that bank received on Mondays, and for which on Tuesdays it remitted by drafts on the Metropolitan Bank of New York. On Saturday, October 26, 1878, the Chemical Bank mailed such a check for \$48,555.62; it was received by the Merchants and Mechanics' Bank the next Monday, and on the same day charged to the drawer's account, and delivered to the drawer with its pass-book. After banking hours of that day the Merchants and Mechanics' Bank received from the Chemical Bank a telegram, "Do you remit to-day for check sent you Saturday? If not, return check to us to-night;" and answered, "We expect to remit to-

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morrow, as usual;" the Chemical Bank replied, "Protest and return check sent Saturday if you don't remit to-night." The next day the Merchants and Mechanics' Bank remitted by draft, the Chemical Bank receiving the draft early Thursday morning. The deposit account of the Troy and Boston Railroad Company was good for the check. The draft was not paid. The Merchants and Mechanics' Bank failed October 31, 1878, and a receiver was appointed.

Charles Jones, for appellant. The Merchants and Mechanics' Bank was the agent of the Chemical National Bank to hold any moneys paid on account of the check sent to it for collection. *Mont. Co. Bk. v. Albany City Bk.*, 7 N. Y. 459. The Merchants and Mechanics' Bank received the money as a trustee to forward it to the petitioner and if it mixed it with its own assets it could not thus change its position as trustee, or take away from the petitioner's property the impress of the trust. 2 Perry on Trusts, §§ 345, 463, 828, 837; Hill on Trustees, 376, note 2; *In re Pet. Le Blanc*, 14 Hun, 8. It came into the hands of the receiver charged with this trust. *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657, 672; Story's Eq., § 1038.

John B. Gale, for respondent.

RAPALLO, J. To entitle the petitioner, the Chemical Bank, to the relief prayed for, it was necessary to trace into the hands of the receiver, money or property which belonged to the Chemical Bank, or which had, before the receivership, been set apart and appropriated to the payment of the check held by the Chemical Bank, so as to constitute a trust fund, the equitable title to which was vested in the last-named bank. It is conceded that if the Chemical Bank was merely a creditor of the Troy Bank, it could not claim a preference over other creditors, whatever may have been the origin of the claim.

The facts relied upon by the appellant as establishing that the assets of the Troy Bank came to the hands of the receiver impressed with a trust in favor of the Chemical Bank, to the amount of \$48,555.62, are, that when the check for that sum, drawn by the Troy and Boston Railroad Company, was sent to the Troy Bank by the Chemical Bank, through the mail, for the purpose of being paid, and was received by the Troy Bank, that bank debited the check to

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the drawer in its account which was then good for the amount, and returned the check to the drawer as paid. The counsel for the appellant contends that charging the check to the drawer in its account with the bank, and returning the check to the drawer as paid, amounted to a payment of the check and the setting apart of a sufficient amount of the drawer's deposits to cover the check. That by sending the check to the Troy Bank through the mail, the Chemical Bank constituted the Troy Bank its agent to collect the check, and to hold the proceeds and send them to the Chemical Bank. That consequently the Troy Bank, having paid the check to itself as agent of the Chemical Bank, held the amount so paid on the check, or set apart for its payment, in trust for the Chemical Bank, and the assets of the Troy Bank embraced the amount so held in trust, and passed to the receiver impressed with that trust.

We are unable to concur in the reasoning, or result of this ingenious argument. There was no actual setting apart or appropriation of any specific fund or property of the bank, or of the drawer, for the payment of the check. It is not claimed that the identical funds which had been deposited by the drawer, and on which deposits the credit on the books was founded, were in the possession of the bank, when the check was presented for payment. It is conceded that they were not, and that the bank had used them in its business, and converted them into securities or investments. The bank was simply debtor to the depositor for the balance of deposits which stood to its credit. By charging the check in account, the bank reduced its indebtedness to the depositor by the amount of the check, and constituted itself debtor to the holder of the check to a corresponding amount. It did not undertake to provide for the check by setting apart or appropriating any particular property or fund for that purpose, but by drawing a draft upon the Metropolitan Bank of New York, and remitting that draft to the Chemical Bank. It certainly assumed the payment of the check, but there is an entire failure to show that it impressed a special trust on any of its assets for that purpose. The learned counsel contends that the Troy Bank was agent of the Chemical Bank to receive payment of the check. Suppose it were, what did it receive as such payment? Simply its own obligation. If any thing was set apart by charging up the check, it was only so much of the bank's indebtedness to its depositor. It constituted itself debtor to the holder of the check in place of its indebtedness to its depositor.

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But it is rather metaphysical to argue that any such agency was created. The check was sent by mail to the bank upon which it was drawn, for payment, not for collection. True, the holder intrusted the bank with the custody of the check until it should be paid. But that is done every time a check is presented over the counter for payment. The only difference in this case is that instead of standing at the counter, or sending some one to stand there to receive payment, the holder requested the bank to remit by mail. In paying the check the bank merely complied with its own obligation to its depositor to honor checks drawn against deposits, and if instead of demanding immediate payment, the holder of the check trusted to the bank to remit, the result was simply to give credit to the bank; not to constitute an agency. *Matter of Le Blanc*, 14 Hun, 8, is referred to as sustaining the claim of the petitioner. That was a border case, but it contains the element which is wanting in the present case, of a specific appropriation of a particular fund, for the payment of the petitioner's claim. In that case the Erie Railway Company had separated from its general assets, and deposited with Duncan, Sherman & Co., a sum of money for the specific purpose of paying the dividends due to the petitioner. That fund, while in the hands of Duncan, Sherman & Co., was clearly impressed with a trust in favor of the petitioner, and it was held that it was not discharged of the trust by being replaced in the possession of the Erie Company, and that the receiver took it, though mingled with other funds, subject to the same trust. To make this case analogous it would be necessary to show that the Troy Bank had separated from its general assets, and placed in the hands of some depositary, a sum sufficient to pay the check, for the express purpose of being so applied, and that this fund had come to the hands of the receiver in some form. There is no approach in this case to any such state of facts. All that appears is that the holder of the check sent it by mail to the bank upon which it was drawn, and requested that bank to remit by a certain time, or return the check, which it failed to do within the time specified, but that it did remit a day or two later, in a draft which was not paid, and in the meantime charged the check to its depositor as paid, the depositor's account being good for the amount. It is impossible out of those facts to construct an appropriation or trust which would attach to the general assets of the bank afterward passing to a receiver, and require their application to the pay-

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ment of the check in preference to all other indebtedness of the bank.

The order should be affirmed.

Order affirmed.

AL concur.

WILLY V. MULLEDY.

(78 N. Y. 310.)

Negligence — fire-escapes — duty to provide.

A statute requires owners of tenement houses to provide such fire-escapes as shall be directed and approved by certain commissioners. *Held*, that the duty is presently imperative, and the owners must procure such direction and approval, without waiting for the action of the commissioners.

ACTION for negligence. The opinion states the case. The plaintiff had judgment below.

Thomas E. Pearsall, for appellant. Where the circumstances admit of two inferences, both equally probable, one in favor of plaintiff and the other in favor of defendant, plaintiff should be nonsuited. *Cordell v. N. Y. C. and H. R. R. Co.*, 75 N. Y. 330; *Robbins v. Mount*, 4 Robt. 554; *Ryan v. Thompson*, 6 J. & S. 133. In order to recover plaintiff must establish that defendant owed some specific, clear legal duty to the deceased, the omission to perform which resulted in the death of plaintiff's intestate. *Nicholson v. Erie R. Co.*, 41 N. Y. 529; Laws 1847, ch. 450. A tenant takes premises at his own risk, in the condition they are at the time of hiring, unless there is some false representation or fraudulent concealment. *Jaffe v. Harteau*, 56 N. Y. 398; s. c., 15 Am. Rep. 438; *O'Brien v. Capwell*, 59 Barb. 497; *McGlashan v. Tadmadge*, 37 id. 313; *Cleves v. Willoughby*, 7 Hill, 86.

A. Simis, Jr., for respondent.

EARL, J. This is an action to recover damages for the death of plaintiff's wife, alleged to have been caused by the fault of the defendant. Prior to the 1st day of November, 1877, the plaintiff

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hired of the defendant certain apartments in the rear of the third story of a tenement house in the city of Brooklyn, and with his wife and infant child moved into them on that day. On the fifth day of the same month, in the day-time, a fire took place, originating in the lower story of the house, and plaintiff's wife and child were smothered to death.

It is claimed that the defendant was in fault because he had not constructed for the house a fire-escape, and because he had not placed in the house a ladder for access to the scuttle.

Section 36 of title 13 of chapter 863 of the Laws of 1873 provides that every building in the city of Brooklyn shall have a scuttle or place of egress in the roof thereof of proper size, and "shall have ladders or stairways leading to the same; and all such scuttles and stairways or ladders leading to the roof shall be kept in readiness for use at all times." It also provides that houses like that occupied by the plaintiff "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioners (of the department of fire and buildings); and the owner or owners of any building, upon which any fire-escapes may now or hereafter be erected, shall keep the same in good repair and well painted, and no person shall at any time place any incumbrance of any kind whatsoever upon said fire-escapes now erected or that may hereafter be erected in the city. Any person, after being notified by said commissioners, who shall neglect to place upon any such building the fire-escape herein provided for, shall forfeit the sum of \$500, and shall be deemed guilty of a misdemeanor."

Under this statute the defendant was bound to provide this house with a fire-escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such a way as they should direct and approve, and it was for him to procure their direction and approval. No penalty is imposed for the simple omission to provide one. The penalty can be incurred only for the neglect to provide one after notification by the commissioners.

Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire-escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage it cannot be doubted that the tenants have a remedy. It is a general rule, that whenever one owes another a duty,

whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative, and where a duty is imposed there must be a right to have it performed. When a statute imposes a duty upon a public officer it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen. *Cooley on Torts*, 654; *Hover v. Barkhoof*, 44 N. Y. 113; *Jetter v. N. Y. C. and H. R. R. Co.*, 2 Abb. Ct. of App. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steele*, 3 Ell. & Bl. 402. In Comyn's Digest, Action upon Statute (F.), it is laid down as the rule that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

There was no fire-escape for this house. But the claim is made on behalf of this defendant that he is not liable in this action, because the plaintiff and his wife knew, when they moved into the house and while they occupied the same, that there was no fire-escape, and hence that they voluntarily took the hazard of its absence. It is undoubtedly true that the plaintiff could have stipulated against or have waived the performance of this duty imposed for his benefit, but this he did not do. There is no proof of any kind that it was the intention of the parties entering into their contract that he should take and occupy this house without a fire-escape. There is nothing to show that he knew there was no fire-escape there when he hired the apartments. It is not shown that his attention was in any way called to the matter or that he looked for one. Its absence could be discovered only by an examination outside of the house, and there is no evidence that he made such examination. He had the right to assume that the statutory duty had been performed. There is no proof that during his occupancy he discovered the absence of a fire-escape. He was there but three days, excluding the day upon which he moved in and the day upon which the fire occurred, and during that time it does not appear how much of the time he was in the house. There is certainly no evidence that he or his wife discovered that there was no fire-escape, or that their attention had been called to the matter. They owed no duty to the defendant to look and see whether there was one there or not.

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They had the right to rely upon its presence there as required by the statute. But suppose they did discover that there was no fire-escape at some time while there, after they moved in, does such discovery absolve the defendant from his duty? After making the discovery, they were not bound at once to leave the house and go into the street. They had a reasonable time to look for and move into other apartments; and by remaining for such reasonable time they waived nothing; and if they did not choose to move out, they were entitled to a reasonable time to find the defendant and to call upon him to furnish the fire-escape. By remaining in the house for such reasonable time after discovery of the breach of duty on the part of the defendant, it could not be said as matter of law that they waived the performance thereof or took upon themselves voluntarily the hazard of all the damages which they might sustain by the non-performance thereof. The duty rested upon the defendant not solely to have a fire-escape there when the plaintiff leased the premises, but it continued to rest upon him; and before it can be held that the plaintiff absolved him in any way from this duty, the proof should be clear and satisfactory. Here, I hold, there was no proof whatever from which it could properly have been found that he did so absolve him.

[Omitting questions of fact.]

The judgment must be affirmed, with costs.

Judgment affirmed.

All concur.

HOOK V. PRATT.

(78 N. Y. 871.)

Negotiable instrument — for the benefit of a third — consideration — support of illegitimate child.

The putative father of an illegitimate child drew a draft payable to his own order, and indorsed payable to the order of the mother, expressly "for the benefit" of the child. *Held* (1), that the undertaking was not illegal; (2) that the draft imported a consideration. (*See note, p. 543.*)

ACTION on a draft. It was admitted that Charles H. Hook, the *cestui que trust*, and the "Charlie" referred to in the indorsement, was a boy some seven or eight years old at the date of the draft,

the illegitimate son of defendant's testator; that plaintiff was at that date a married woman, living in the city of Rochester with her husband, who is made a defendant, and was married not long before the draft was drawn. The boy lived with her and was taken care of by her. The opinion states the facts. The plaintiff had judgment below.

Daniel Pratt, for appellants. Every absolute indorsement of a bill of exchange imports a consideration from the indorsee to the indorser; but in order that this quality should attend the instrument it should be for the payment of money only, absolutely and at all events. 3 Kent Com. 74; 1 Dan. on Bills, 2; Chit. on Bills, 152, 154, 157, 218, 219; Story on Prom. Notes, § 128; *Dean v. Hall*, 17 Wend. 221; *Overton v. Tyler*, 3 Penn. 346. A bill of exchange, in case of a restrictive indorsement, ceases to be further negotiable and imports no consideration from the indorsee to the indorser, nor does it imply any promise to pay. Dan. on Bills, 515; Edw. on Bills, 69; Byles on Bills, 208; Ross on Bills, 279; Story on Bills, §§ 111, 112; Bayley on Bills, 107; Chit. on Bills, 258, 259; 3 Kent Com. 92; *Power v. Finnie*, 4 Call, 411; *Wilson v. Holmes*, 5 Mass. 543; 4 Am. Dec. 75; *Sigourney v. Lloyd*, 8 B. & C. 622; *Treuttel v. Barandon*, 8 Taunt. 100; *Anchor v. Bk. of England*, Doug. 637; *Blaine v. Bourne*, 11 R. I. 119; s. c., 23 Am. Rep. 429; *Eddie v. East India Co.*, 2 Burr. 1216, 1227; *Holliday v. Atkinson*, 5 B. & C. 501; *Sweeny v. Easter*, 1 Wall, 166; *Averetts' Adm. v. Booker*, 15 Gratt. 163; *Brown v. Jackson*, 1 Wash. C. C. R. 512; 1 Atk. 247. The indorsement of the note in suit is restrictive. *Eddie v. East India Co.*, 2 Burr. 1227; Dan. on Bills, 127; 3 Kent Com. 92; 3 Mass. 228; Chit. on Bills, 220; *Averetts v. Booker*, 15 Gratt. 170; *Holliday v. Atkinson*, 5 B. & C. 501; *Wait v. Day*, 4 Den. 439; *Moncrief v. Ely*, 19 Wend. 405. If the draft in suit was given in consideration of past illicit cohabitation it is void. Pars. on Cont. (4th ed.), 361; 1 Story on Cont., § 543; *Beaumont v. Reeve*, 8 Q. B. 483; *Eastwood v. Kenyon*, 11 A. & E. 438. It was also void as a promise to provide for the future support of the child. *Moncrief v. Ely*, 19 Wend. 405; *Birdsall v. Edgerton*, 25 id. 619; 1 Car. & P. 268; Reeves' Dom. Rel. 277; 2 Kent Com. 216. As a gift or donation it was void for the want of a consideration. *Harris v. Clark*, 3 Coms. 93; *Fink v. Cox*, 18 Johns. 145; 9 Am. Dec. 191; *Phelps v. Phelps*, 28 Barb. 121; *Holliday v. Atkinson*, 5 B. & C. 501.

Irving G. Vann, for respondent.

RAPALLO, J. The point mainly relied upon by the appellant is that the draft and indorsement upon which this action is brought do not on the face import a consideration. The draft was drawn by the defendant's testator upon the treasurer of an incorporated company, payable to the drawer's own order, and purported to be for value received. It was indorsed by the drawer by a special indorsement, "Pay to the order of Mrs. Mary Hook, for the benefit of her son Charlie." The appellant claims that this is one of those restrictive indorsements which do not purport to be made for a consideration, and do not entitle the indorsee to maintain an action on the bill, without proving a consideration.

As a general rule an indorsement of a negotiable bill which purports to pass the title to the bill to the indorsee, imports a consideration, and the burden of proving want of consideration rests upon the party alleging it. The restrictive indorsements which are held to negative the presumption of a consideration are such as to indicate that they are not intended to pass the title, but merely to enable the indorsee to collect, for the benefit of the indorser, such as indorsements "for collection" or others showing that the indorser is entitled to the proceeds. These create merely an agency, and negative the presumption of the transfer of the bill to the indorsee for a valuable consideration.

But where the indorsement purports to pass the title to the bill therein from the indorser, and divest him of all beneficial interest, a consideration for such transfer is presumed. All the cases cited by the counsel for the appellant rest upon these principles. The citation from 3 Kent Com. 92, states the principle to be that when the indorsement is a mere authority to receive the money for the use or according to the directions of the indorser, it is evidence that the indorsee did not give a valuable consideration for it and is not the absolute owner. This accords with the statement of the principle by WILMOT, J., in *Edie v. E. India Co.*, 2 Burr. 1227. So an indorsement "Pay to S. W. or order for our use" (*Sigourney v. Lloyd*, 8 B. & C. 622 ; s. c., 3 Y. & J. 220), was held to create a mere agency, and the addition even of the words "value received" to such an indorsement has been held not to vary its effect. *Wilson v. Holmes*, 5 Mass. 543. In *Edie v. East India Co.*, 2 Burr. 1221, the examples of restrictive indorsements put by way of illustration

are, "Pay to my steward and no other person," or "pay to my servant for my use." These show that there was no intention to pass the title to the bill; and the same effect has been given to an indorsement, "Pay to P. only." It was held that these words indicated that the indorsee was agent only, and paid no consideration for the bill, as a purchaser would not have accepted such an indorsement. *Power v. Finney*, 4 Call, 411. But an indorsement to one person for the use or benefit of another, affords no such indication. The indorser parts with his whole title to the bill, and the presumption is that he does so for a consideration. The only effect of such an indorsement, by way of restriction, is to give notice of the rights of the beneficiary named in the indorsement, and protect him against a misappropriation. When a bill is indorsed, "Pay to A or order for the use of B," A cannot pass the bill off for his own debt, but he can, by indorsing it, transfer the title, and will hold the proceeds for the benefit of B, and be accountable to him for them. *Evans v. Cramlington*, Carth. 5, affirmed in the Exchequer Chamber, 2 Vent. 309. In *Treuttel v. Barandon*, 8 Taunt. 100, cited by the appellant, drafts payable to the drawer's own order were indorsed by him to De Roure & Co. or order, "for the account of Treuttel & Wurzel." It appeared that De Roure & Co. were the agents of Treuttel & Wurzel, and the latter were held entitled to maintain trover for the drafts against a party to whom De Roure & Co. had pledged them for their own debt. There is nothing in this case to sustain the proposition that a draft thus drawn and indorsed does not import a consideration, or that the indorsee could not maintain an action upon it against the drawer and indorser without proving a consideration. The effect of the special indorsement was simply to give notice of the interest of Treuttel & Wurzel, and prevent De Roure & Co from appropriating the draft to their own use. *Blaine v. Bourne*, 11 R. I. 119; s. c., 23 Am. Rep. 429, is to the same point. In the present case the indorsement did not purport to restrain the indorsee from negotiating the draft, for it was "Pay to the order of Mrs. Mary Hook," for the benefit of her son Charlie. She was constituted trustee of her son and held the legal title. 3 Kent Com. 89. The indorsement gave notice of the trust, so that if she had passed it off for her own debt, or in any other manner indicating that the transfer was in violation of the trust, her transferee would take it subject to the trust, but there was nothing reserved to the drawer and indorser. He retained no interest in it.

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The presumption is that the draft was drawn and indorsed by him for a consideration received either from the indorsee or the beneficiary. If the youth of the beneficiary should be deemed to afford a presumption that no consideration was paid by him, the presumption would be that it emanated from his mother. The facts admitted on the trial do not establish that the consideration was illegal. They show that the boy lived with his mother and was taken care of by her. There is nothing illegal in an undertaking by a putative father to support his illegitimate child, or to pay a sum of money in consideration of such support being furnished by another, though it be the mother of the child. If such was the consideration of the obligation, and it was furnished by Mrs. Hook, she was at liberty to take it payable to herself in her own right, or for the benefit of her child. *Hicks v. Gregory*, 8 C. B. 378; *Smith v. Roche*, 6 C. B. (N. S.), 223; *Nichole v. Allen*, 3 C. & P. 36; *Jennings v. Brown*, 9 M. & W.; 496 *Knowlman v. Bluett*, L. R., 9 Exch. 1, 307; *Bunn v. Winthrop*, 1 Johns. Ch. 337, 338.

The judgment should be affirmed.

Judgment affirmed.

All concur

NOTE BY THE REPORTER.—It was held in *Nine v. Starr*, 8 Or. 49, that where the putative father of a bastard child agrees with the mother that he will pay her for boarding and clothing such child, such contract is without consideration, and cannot be legally enforced. The mother of such child is the guardian, and bound to maintain it. The court said: "We think that whatever the moral obligation of a putative father may be to support such a child, no legal obligation attaches to him in that behalf, and that this legal obligation is upon the mother. Tyler on Inf. and Cov., 285, lays down the rule that the mother is the natural guardian of such a child, and is bound to maintain it, and we think such is the law. When one agrees to pay another for a service which that other is legally bound to perform, the contract is without consideration, and cannot be enforced. Pars. on Cont. 424. It may be truly said that the respondent was under a moral obligation to contribute to the support of this illegitimate child, and it is insisted that this is a sufficient consideration to support this promise. But to constitute a moral obligation the consideration of an express contract which may be enforced by an action at law, there must have been some pre-existing legal obligation. This legal obligation may have ceased to have force by reason of the statute of limitations, or the like; but there having been a legal obligation, the moral obligation is sufficient to revive the liability by means of an express promise. *Mills v. Wyman*, 8 Pick. 207; *Dodge v. Adams*, 19 Id. 429; *Cook v. Brady*, 7 Conn. 57."

The contrary, however, is maintained by the authorities cited in the principal case. In *Bunn v. Winthrop*, 1 Johns. Ch. 329, it was held that provision for the mother of a bastard and her infant is a sufficient consideration to support a bond or deed of chattels, made by the father of the child for that purpose.

In *Knowlman v. Bluett*, L. R., 9 Ex 309, it was held the mother might recover from the father moneys which she had expended at his request in the support of their illegitimate children.

WHITE V. MILLER.

(78 N. Y. 393.)

Damages — measure of — interest on.

In an action of damages for breach of warranty on sale of seed, *held*, that the proper measure of damages is the difference in value between the crop raised and the crop represented, without interest.

ACTION for breach of warranty on sale of seed. The opinion states the case. The plaintiff had judgment below.*

R. W. Peckham, for appellant.

Esek Cowen, for respondents. Plaintiffs were entitled to interest on the damages from the commencement of the action. *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Van Buren v. Van Gaasbeck*, 4 Cow. 496; *Tucker v. Ives*, 6 id. 193; *McKnight v. Dunlop*, 4 Barb. 36; *Barnard v. Bartholemew*, 22 Pick. 291; 22 Me. 161; *Mygatt v. Wilcox*, 45 N. Y. 306; s. c., 6 Am. Rep. 90; *Feeter v. Heath*, 11 Wend. 477-484; *McCollum v. Seward*, 62 N. Y. 316; *Mercer v. Vose*, 67 id. 56. The interest should have been allowed by way of full indemnity to the plaintiff. *Fishell v. Winans*, 38 Barb. 230; *Wells v. Selswood*, 61 id. 238.

EARL, J. This is an action to recover damages for a breach of warranty in the sale of cabbage seeds. The warranty, as alleged and found, is that the seeds were Bristol cabbage seeds, and it was found that they were not, and that they did not produce Bristol cabbages. The rule of damages, as laid down by the trial judge in his charge to the jury, was in conformity with the decision of this court when the case was here upon a prior appeal (71 N. Y. 118; 27 Am. Rep. 13), the difference in value between the crop actually raised from the seed sown and a crop of Bristol cabbage, such as would ordinarily have been produced that year. The judge also charged the jury that if they found for the plaintiffs, they should also allow them interest upon the amount of damage from the commencement of the suit, April 15, 1869, to the day of their verdict.

* See *DeLavallette v. Wendt* (73 N. Y. 579), 31 Am. Rep. 494.

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May 30, 1878. The jury found the damage to be \$2,000, and the interest upon this sum to be \$1,277.49, and gave plaintiffs a verdict for the amount of the two sums. The defendant excepted to the charge as to interest, and this exception presents the only question for our consideration.

The law in this State as to the allowance of interest in common-law actions is in a very unsatisfactory condition. The decisions upon the subject are so contradictory and irreconcilable that no certain rule for guidance in all cases can be deduced from them.

The common-law rule, as expounded in England, allowed interest only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade. Mayne Law of Damage (2d ed.), 105; *Higgins v. Sargent*, 2 B. & C. 349. In the absence of these conditions interest was not allowed in an action for money lent, or for money had and received, or for money paid, or on an account stated or for goods sold, even though to be paid for on a particular day, or for work and labor. *Gordon v. Swan*, 12 East, 419; *Calton v. Bragy*, 15 id. 223; *Walker v. Constable*, 1 B. & P. 306; *Carr v. Edwards*, 3 Stark. 132; *Nichol v. Thompson*, 1 Camp. 52, n.; *Trelawney v. Thomas*, 1 H. Bl. 303.

Thus the law remained in England until the statute of third and fourth William IV, which provides that upon all debts or sums certain, and in actions of trover and trespass *de bonis asportatis*, and in actions upon policies of insurance, the jury may in their discretion allow interest as part of the recovery.

We have no statute in this State regulating the allowance of interest in such cases. The rule early adopted here upon the subject was more liberal than that adopted in England. The allowance of interest was at first mainly confined to cases coming within the common-law rule as above defined, and to actions to recover money wrongfully detained by the defendant. The rule was then extended so as to allow interest upon the value of property unjustly detained or wrongfully taken or converted, and for goods sold and delivered, and for work and labor; and thus, by a sort of judicial legislation, the allowance of interest, as a legal right, was carried much further here than the scope of the English statute where the allowance was placed simply in the discretion of the jury. At first the allowance of interest in actions of trover and trespass *de bonis asportatis* was in the discretion of the jury. Now it is held to be matter of legal

right. Down to a recent period interest was not allowed upon unliquidated accounts or demands. Now that last landmark has been swept away, and the sole fact that a demand has not been liquidated is not a bar to the absolute legal right to interest.

A reference to a few recent decisions will show the present state, or as I might with propriety say, the uncertain state of the law upon the subject.

In *Van Rensselaer v. Jewett*, 2 N. Y. 135, the action was to recover rent payable in produce and work; and it was held that the plaintiff was entitled to recover interest from the time the rent fell due. It was admitted by Judge BRONSON, writing the opinion, that the damages were unliquidated, and that there was no agreement for interest. He however laid down the general rule thus: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, he is chargeable with interest, from the time of default, on the specified amount of money, or the value of the property or services, at the time they should have been paid or rendered. In *Dana v. Fiedler*, 12 N. Y. 40, the action was on a contract to recover damages for the non-delivery of merchandise; and it was held that the plaintiff was entitled to recover not only the difference between the contract-price and the market-value, but also the interest on such difference; and that the allowance of interest did not rest in the discretion of the jury. In *McMahon v. New York and Erie R. Co.*, 20 N. Y. 463, it was held that interest could be allowed upon an unliquidated disputed claim for work under a contract for the construction of a railroad. The allowance was based upon the curious ground that the debtor was in default for not having taken the requisite steps to ascertain the amount of the debt. In this case, Judge SKLDEN, speaking of the case of *Van Rensselaer v. Jewett*, said that that case went a step further in the allowance of interest than the prior cases, "and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market-values; because such values in many cases are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay." In *Adams v. Fort Plain Bank*, 36 N. Y. 255, and *Mygatt v. Wilcox*, 45 id. 306; s. c., 6 Am. Rep. 90, it was held that interest could be recovered in an action by an attorney upon his account for services. The value of the services does not seem in either case to have been

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disputed. In the first case, it was held that interest could be recovered from the time payment for the services was due; and in the latter case, it was held that it could be recovered from the time the account was rendered by the attorney to his client. The right of recovery was based upon the theory that there was default in paying money due. In both cases, the account appears to have been substantially liquidated, the liability to pay alone being litigated. In *Smith v. Velie*, 60 N. Y. 106, the action was to recover for services as housekeeper for defendant's intestate during many years. The plaintiff had from time to time received money and goods to apply upon her account. There was no agreement as to the measure of compensation, and it was held that the account was unliquidated, and that interest was not recoverable, even from the death of the intestate, as there was not a fixed market-value by which the rate of wages could be determined. In *McCollum v. Seward*, 62 N. Y. 316, the action was upon an unliquidated disputed claim for work and labor, and the referee allowed interest from the commencement of the action; and this, upon the appeal of the defendant, was held not to be erroneous. In *Mercer v. Vose*, 67 N. Y. 56, the action was to recover for services rendered by the plaintiff to the defendant. The claim was unliquidated and contested. The referee allowed interest upon the balance found by him from the time plaintiff left defendant's service, and demanded his pay. The action was commenced in about a month after such demand was made, and it was held that plaintiff was entitled to recover interest at least from the commencement of the action, and that if there was any error in allowing interest from an earlier date, it was too trifling to require correction. Upon the prior trial of this action, interest was allowed from the time a crop could have been harvested and sold, if the seed had been as warranted. This was held by this court to have been erroneous, on the ground that "the demand was unliquidated and the amount could not be determined by computation simply or reference to market values."

This brief presentation of decided cases shows how difficult it is to deduce from them any certain rule as to the allowance of interest. A statute could probably be framed which would produce more certain, if not juster results. But it must be seen that to uphold this judgment, the rule as to the allowance of interest must be carried at least one step further than it has ever yet been carried; and we are unwilling that the step should be taken in this case.

After a very thorough examination of the cases in England and this country, I have not been able to find one, prior to this one, in which it has been held that in a case where the claim was such as not to draw interest from an earlier date, interest could be allowed from the commencement of the action, unless the claim was such that the interest could be set running by a demand, the commencing of the action in such case being a sufficient demand.

In *Feeter v. Heath*, 11 Wend. 479, the action was to recover for work, labor and materials. There was no dispute as to the amount of plaintiff's claim; the only dispute was whether the defendant was personally responsible for the same. The agreement was to pay the plaintiff upon performance of his contract; and the court held that he was entitled to interest at least from the commencement of the action, as that was a legal demand of payment. Under the contract the plaintiff was entitled to interest from the time his money was due; and that was either when he finished his contract, or when he presented his bill and demanded payment; and the court held that the commencement of suit was a sufficient demand. If a demand was necessary, under the circumstances of that case, a demand before suit would have been just as effectual, for the purpose of the interest allowance, as the demand by the commencement of suit; and if such a demand had been made, the plaintiff would have been entitled to interest at least from the time of such demand. In *McCollum v. Seward*, *supra*, the referee allowed interest from the commencement of the suit; and that was held not to be erroneous. It was not decided that it would have been erroneous to have allowed interest from an earlier date; and the same is true of the case of *Mercer v. Vose*. If in each of those two cases an account had been made and presented to the debtor, and payment demanded, it is probable that the court would have sustained an allowance of interest, from such demand.

In *Barnard v. Bartholomew*, 22 Pick. 291, the action was to recover a balance of account for money and professional services, and it was held that "interest is to be allowed where there is an express promise to pay it, or where there is a usage proved from which the jury may infer a promise to pay; and also it may be given as damages for the detention of a debt after the time when due by the terms of the agreement, or for neglect to pay a debt after a special demand." In *Ames v. Wilson*, 22 Me. 116, the action was upon an account for goods sold and delivered, and it was

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held that the plaintiff would be entitled to interest prior to the commencement of the suit, "by proof of an agreement to pay it, or by proof of a demand of payment anterior to the date of the writ."

The cases last cited tend to show that where an account for services, or for goods sold and delivered, which has become due and is payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date. But there is no authority for holding in a case like this, where the claim sounds purely in damages, is unliquidated and contested, and the amount so uncertain that a demand cannot set the interest running, that it can be set running by the commencement of the action. Why should the commencement of an action have such effect? The claim is no less unliquidated, contested and uncertain. The debtor is no more able to ascertain how much he is to pay. No new element is added. The conditions are not changed, except that the disputed claim has been put in suit, and there is no more reason or equity in allowing interest from that than from an earlier date. If interest as a legal right can be allowed in this case from the commencement of the action, then it must be allowed from the same date in all actions *ex contractu*, and logically it would be impossible to refuse it in actions *ex delicto*.

Therefore, when this court, upon the prior appeal, decided that the nature of this claim was such that interest could not be allowed thereon from a time anterior to the commencement of the action, it really decided the question now presented.

The judgment of the General Term must therefore be reversed, and the judgment entered upon the verdict must be modified by striking therefrom the sum of \$1,277.49, and as thus modified it must be affirmed, without costs to either party as against the other upon the appeal to the General Term and to this court.

Judgment accordingly.

All concur.

ARTHUR V. HOMESTEAD FIRE INSURANCE COMPANY.

(78 N. Y. 462.)

Insurance — limitation of suit on policy — second action.

A fire policy was conditioned that no suit upon it should be sustained unless commenced within a year after the claims should accrue. An action was commenced upon it within the year, and on the trial it appeared that in the statement of incumbrances in the application, a mortgage had been omitted. The plaintiff offered to show that the defendant's agent was informed of the mortgage but omitted it by mistake. The court excluded the evidence, but offered to allow the plaintiff to amend his complaint, setting up the mistake. The plaintiff refused, and was nonsuited. Afterward, and after the lapse of a year from the accruing of the claim, he commenced another suit. *Held*, not maintainable, although the defendant's counsel accepted the costs in the first suit, and gave the plaintiff's counsel time to make case or exceptions.

ACTION for the reformation of a contract of insurance and for recovery thereon as reformed. The statements in the application were by the policy made warranties. The application in answer to the question "how much is it incumbered?" understated the amount. The insured, however, stated the correct amount to the agent of defendant, who had authority to and did deliver the policy, but the agent filled up the application, and the applicant, without reading it, or hearing it read, signed it in ignorance of the error, and immediately delivered it to the agent. A loss occurred March 8, 1876.

In August, 1876, plaintiff commenced an action to recover the loss, to which the defendant answered that, by reason of the false statement in the application, the policy was void. On that trial the plaintiff offered to prove that the agent was informed at the time of the true amount of incumbrance, and by mistake omitted to insert it in the application. The court excluded the evidence, but stated that he should allow the pleadings to be amended. The plaintiff did not accept the suggestion, and on motion of defendant was nonsuited. The plaintiff had time to make a case and exceptions, which, by stipulation of defendants, was extended, but none were made, and no judgment was entered. On the 16th of June, 1877, the costs were paid by plaintiff. The present suit was commenced October 12, 1877. The opinion states other facts. The plaintiff had judgment below.

Arthur v. Homestead Fire Insurance Company.

F. W. Hubbard, for appellant.

Edwin H. Risley, for respondent. The agent's knowledge, is knowledge on the part of the company, and it must be presumed to have intended to waive the condition of the policy. *Van Schoick v. Niag. F. Ins. Co.*, 68 N. Y. 434; *Mead v. West. Ins. Co.*, 64 id. 453. The former action was not a bar. *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Wheeler v. Ruckman*, 51 id. 391. The limitation in the policy, that no action should be maintained unless brought within one year from the time the loss accrues, is inoperative. *Curtis v. Home Ins. Co.*, 1 Biss. 485; *Ripley v. Astor Ins. Co.*, 17 How. Pr. 444; *Grant v. Lexington Ins. Co.*, 5 Ind. 23; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; s. c., 14 Am. Rep. 494; *Ames v. N. Y. Ins. Co.*, 14 N. Y. 253; *Mayor v. H. Ins. Co.*, 39 id. 45, 46. The nonsuit in the former action was a waiver of strict compliance. *Madison Ins. Co. v. Fellows*, 1 Dis. 217; s. c., 2 id. 128; Wood on Ins., § 441; *Peoria F. and M. Ins. Co. v. Hall*, 12 Mich. 202; *Ah King v. People*, 5 Hun, 297. The time when the limitation began to run was July 8, 1876. *Mayor v. Home F. Ins. Co.*, 39 N. Y. 45; *Mix v. Andes Ins. Co.*, 9 Hun, 397. The action did not accrue until the judgment reforming the contract was pronounced. *Hay v. Star F. Ins. Co.*, 13 Hun, 496; *Ah King v. People*, 5 id. 297. An action can be maintained to reform an instrument, and to recover upon it as reformed. *Bidwell v. Astor M. Ins. Co.*, 16 N. Y. 267; *Welles v. Yates*, 44 id. 531; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517. An action to reform the contract was not only necessary in this action, under the circumstances but was proper, irrespective of the former decision. *Maher v. Hib. Ins. Co.*, 67 N. Y. 283; *Ripley v. Aetna Ins. Co.*, 30 id. 136; *Rohrback v. Germ. F. Ins. Co.*, 62 id. 47; s. c., 20 Am. Rep. 451; *Alexander v. Germ. Ins. Co.*, 66 N. Y. 464; s. c., 23 Am. Rep. 76; *Foot v. Aetna Ins. Co.*, 61 N. Y. 571.

DANFORTH, J. The complaint states two causes of action; one for loss by fire, of property insured by the defendant, the other for reformation of the application, upon the faith of which the policy issued. The policy provides that no action shall be sustained against the company under or by virtue of it, unless commenced within one year next after any claim shall accrue, and the omission

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to comply with its terms, is, I think, a conclusive answer to the complaint. That such condition is valid cannot now be questioned. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136.

The loss occurred on the 8th of March, 1876. Proofs of loss were duly served on the 8th of May, and as by the terms of the policy the amount thereof became payable in sixty days thereafter, the claim accrued on the 8th of July, 1876. The action was not commenced within a year thereafter, and the case is thus brought directly within the terms of the condition. Nothing occurred during the progress of the former suit to relieve the party from its effect. That was an action on the policy upon the grounds stated in the first cause of action herein. In it the plaintiff might have had all the relief which he now seeks, and with or without the amendment, which the court gave him leave to make, he would have been entitled to recover, if the facts had been then established as they are now found to be. *Emery v. Pease*, 20 N. Y. 62; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 id. 357. It is claimed that equitable relief is sought in this case; if necessary it could have been had in that. To the objection made by the defendant in its answer, and proved upon the trial that the incumbrances on the property insured exceeded the amount stated in the application, the plaintiff could very properly have replied by proving the facts set up in the second cause of action in this case. In doing so he would not have gone beyond the provisions of the Code (§ 168 of the Old, § 522 of the New), by which the new matter is deemed controverted, and the plaintiff without pleading permitted to traverse or avoid it as the case may require. Nor would he have invoked new doctrine, for the rule since the union of legal and equitable remedies in one system, and their application by one court has been repeatedly applied, and declared to be so broad that it secures to the plaintiff the benefit of every possible answer to the defense made by way of new matter, not constituting a counter-claim, as fully as though it were alleged in the most perfect manner. For that purpose evidence admissible under the principles of either law or equity takes the place of pleading. *Dobson v. Pearce*, 12 N. Y. 156; *Phillips v. Gorham*, 17 id. 270.

I have not adverted to the former suit as being a bar to this, or in any way preventing the bringing of another, but to show that the present one was unnecessary so far as the enforcement of any legal or equitable right of the plaintiff is concerned. Nor do I

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think that the conduct of the defendant therein gives any new life to the plaintiff's cause of action. Doubtless the condition might be extended or waived by such acts of the insurer as hindered or prevented the action, or induced the insured to suppose that a strict compliance therewith would not be insisted upon, but in such a case he must have acted in good faith and been actually misled. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136. The plaintiff insists that this was the result of the defendant's conduct in the former suit. But so far from deluding the defendant with false hopes, it would seem to indicate on its part a determination to resist payment and yield no grace or favor. Its agents, as we learn from the opinion of the court below, as early as the 8th of May, 1876, notified the plaintiff that by reason of the misstatement in the application the defendant was "let out," "that the policy was void, and the plaintiff had no legal claim against it." The objection was insisted upon by answer, and relied upon at the trial. It is true the defendant's counsel objected to evidence which it seems should have been received, and that the court sustained the objection, but at the same time gave leave so to amend the pleadings as to make the evidence admissible. The favor of the court was rejected, and the plaintiff's counsel, insisting that he was right, obtained time to make a case upon which to review the ruling. I am unable to perceive in any of these matters, in the action of the court or counsel, any thing soever to prevent the defendant insisting upon the condition, nor that its doing so is any impeachment of its good faith. That the plaintiff's counsel failed to proceed in that action, and paying costs thereof abandoned it, cannot tend to the advantage of the plaintiff or confer a new right against his adversary. As the commencement of that action does not bring the present within the limitation, neither does its failure extend the time. *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386. The cases cited by the learned counsel for the respondent are abundant to show that waiver may be implied from slight circumstances, but none afford any support to the position that a successful defense of one action estops a party from insisting that a second cannot be maintained because commenced too late. Nor does the acceptance of costs given to indemnify a successful litigant for the false clamor of his adversary furnish to the latter any consideration or excuse for non-compliance with a contract stipulation.

The plaintiff also relies upon the fact that the defendant's coun-

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sel extended the time within which the plaintiff might prepare his case, or bill of exceptions in the first action. There is no connection between the two events, nor was one the inducement of the other. An attorney may mitigate the rigor of practice in one suit without creating a new cause of action against his client.

It is further urged that the defendant should be estopped from asserting that the plaintiff had a remedy at law, so far at least as it affects the limitation of the time of commencing the action, because the defendant's counsel upon the trial of the first action insisted that the remedy of the plaintiff was in equity, and not at law. What the defendant's counsel did upon the former trial, and in the progress of it, is binding upon his client so far as that action and its consequences are concerned, but no farther. It was not within the scope of his authority to change the rights of his client except so far as it might be done in that action; and by putting an end to that, he did not justify the commencement of another, nor could he create a cause of action which did not before exist. But although the court entertained the objection, the trial judge gave leave to amend. Instead of doing so the plaintiff elected to discontinue; this was not the fault of the defendant, yet it was still in the plaintiff's power to commence a new action before the expiration of the year; he did not do so, and for his omission the defendant is in no respect to blame.

The second cause of action, although in form for the reformation of the application, is in fact to get rid of a defense interposed by the defendant, and so far, and for that purpose is unnecessary. Nor would the contract of insurance be other or different when the application is corrected, than it was before. *Maher v. Hibernian Ins. Co.*, 67 N. Y. 283. The cases cited by the learned counsel for the respondent lead to no other result, for they are inapplicable to the case in hand. *Woodbury Savings Bank v. Charter Oak Fire and M. Ins. Co.*, 31 Conn. 517, was a suit in equity. An action at law had been commenced upon the policy issued by the defendant within the time limited, and it was held that the suit in equity, although commenced afterward, was not barred, because it was in aid of the other. In Connecticut the distinction between the systems of law and equity is still preserved, and the latter was alone competent to the relief sought. In *Hay v. Star Ins. Co.*, 13 Hun, 496, affirmed in this court, 77 N. Y. 235; s. c., 33 Am. Rep. 607, the policy contained a contract different from the one bargained for,

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and had been fraudulently issued in its place. The plaintiff held nothing upon which he could maintain an action, and the object was to compel the defendant to give a policy according to its agreement, or in the language of the opinion in that case, it "was as though no policy had been issued, and the action was for the specific performance of the agreement to insure." In the case before us the plaintiff holds a policy perfect in all its stipulations, and according with the agreement of the parties. The difficulty is that the defendant seeks to avail itself of a defense caused by the act or omission of its agent, but it is one which the plaintiff could have avoided in the former action. This action was not necessary and was commenced too late. I can discover no ground on which the plaintiff can stand against this appeal.

The judgment of the General and Special Terms should therefore be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur.

BUEL V. PEOPLE.

(78 N. Y. 492.)

Criminal law — murder committed during rape.

The defendant killed a woman by strangling her while attempting to commit a rape upon her. *Held*, murder in the first degree, within a statute making the killing of any person, by one while engaged in the commission of a felony, murder in the first degree.

CONVICTION of murder in first degree. The opinion states the case.

James A. Lynes, for plaintiff in error. The court erred in charging that the jury in effect should bring in either a verdict of murder in the first degree, or of acquittal. 3 R. S. (6th ed.) 995, § 48. The court erred in charging that if the prisoner killed the girl in the commission of a rape upon her person, it was murder in the first degree. Barb. Cr. Pr. 65-67; *People v. Quin*, 50 Barb. 128; *id.* 144; *People v. Morrison*, 1 Park. Cr. 625-644; *People v. Abbott*, 19 Wend. 192; *People v. Bransby*, 32 N. Y. 525; 34 Eng. Com. L.

539. Subd. 3, § 5, 2 R. S. 656, as amended by chapter 333, Laws of 1876, includes only those cases where the felony is a separate and distinct offense from the killing. 3 R. S. 928, 932; *People v. Rector*, 19 Wend. 608; *People v. Butler*, 3 Park. Cr. 377-385; *Foster v. People*, 50 N. Y. 598-602, 603; 10 id. 120; 3 R. S. (6th ed.) 928, § 4; 1 Whart. Am. Cr. Law, 560; 4 Wend. 265; 3 Hill, 92; 1 Green Cr. 267-275; 2 id. 381-385; *People v. Smith*, 57 Barb. 46.

L. L. Bundy, for defendant in error.

MILLER, J. The prisoner was convicted of the crime of murder in the first degree. The indictment contained sixteen different counts; eight of them were framed charging that the offense of murder had been committed in contravention of the first subdivision of section 5 of 2 Revised Statutes, 656 (1st ed.); and the remaining eight under the third subdivision of the same statute, as amended by chapter 644, S. L. of 1873, and by chapter 333 of the S. L. of 1876. The statute is as follows: "Such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the first degree, in the following cases: First, when perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. Second, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third, when perpetrated by a person engaged in the commission of any felony. Such killing, unless it be murder in the first degree or manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the second degree, when perpetrated intentionally but without deliberation and premeditation."

The latter counts charged that the crime was committed while ravishing or attempting to ravish the deceased, and it was averred in some of them that the prisoner, while engaged in the commission of the rape or felony, and in others, while in the commission of the assault with the intent to commit the rape or felony, with a rope which he had placed upon the neck of the deceased, strangled and suffocated her, from which she died. The evidence tended to show that the death of the deceased was caused from strangulation produced by a strap or rope drawn around her neck by the prisoner

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while committing a rape upon her. The proof also showed that a violent blow had been inflicted upon her head. The judge charged the jury, among other things, that if they believed that the prisoner put the rope around the neck of the deceased, or inflicted a blow upon the head of the deceased, as claimed by the prosecution, with a design to effect death, with premeditation and deliberation, he was guilty of murder in the first degree, under the first clause of the section of the statute cited. The judge also charged the jury that if the deceased resisted, and the prisoner overcame that resistance by putting the rope around her neck, and thus made her incapable of resistance, and under these circumstances committed the offense, even although he did not intend to take her life, and although his object and purpose was simply to accomplish his purpose of having criminal connection with the deceased, and he did this simply to overcome her resistance, and if that was his purpose and intent, and she died while he was thus engaged in that act, then it was murder in the first degree. At the close of the case, the counsel for the prisoner excepted to that part of the charge in which the court charged that if death was caused by the commission of the offense, it would be murder in the first degree, and no request was made for any other or different directions than those contained in the charge.

It is claimed by the counsel for the prisoner that the court erred in the charge to the jury that if the prisoner killed the girl in the commission of a rape upon her person, it was murder in the first degree; that this was a wrong interpretation of the third subdivision of the fifth section of the statute which properly includes only those cases where the felony is a separate and distinct offense from the killing; and that it has no application to a killing where the death results directly from the personal violence used in making the assault, and where the felony is completely merged and lost in the higher crime. The argument is that force is necessary to constitute the crime of rape, and the very gist of the offense is that it must be accomplished against the will and resistance of the female; that it cannot be separated from the carnal knowledge, and that the strangling of the deceased to overcome her resistance was an indispensable part of the rape, without which it could not have been committed, and hence the prisoner was not guilty of the crime of murder, and therefore the charge was erroneous. We think that this position cannot be upheld upon any sound legal principle; and

assuming that the charge of the judge embraced the proposition claimed, it was not error. While force and violence constitute an important element of the crime of rape, they do not constitute the entire body of that offense. The unlawful or carnal knowledge is the essence of that crime; and without this, no matter what degree of force or violence may be employed, rape is not established. 1 Russ. on Crimes (1st ed.), 557, 558; 1 Hawk. P. C., ch. 41, § 2. It may even be committed where there is a yielding to violence and the consent is procured by fear of death or duress. *Id.* Be that as it may, however, we think it is not important if the death of the deceased was caused by the prisoner while he was perpetrating the crime of rape. He was then engaged in the commission of a felony, within the language, meaning and purpose of the statute; and if death ensued in consequence of that felony, the offense is brought directly within the definition of the crime of murder in the first degree.

The statute in reference to murder has undergone numerous changes since the enactment of the Revised Statutes. 2 R. S. 657, § 5, defines when the killing shall constitute murder, and the third subdivision is as follows: "When perpetrated without any design to effect death by a person engaged in the commission of any felony." The killing while engaged in the perpetration of any felony which caused death, even if unintentional, is here expressly declared to be murder. An alteration was made by chapter 410 of the Laws of 1860, and it is there provided that "all murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or the attempt to perpetrate any arson, rape, robbery or burglary, or in any attempt to escape from imprisonment, shall be deemed murder in the first degree." It will be noticed that this provision specifies the felonies in the perpetration or attempt to perpetrate which the killing would be murder, thus leaving no question but what a killing, under such circumstances, is murder in the first degree.

By chapter 197, S. L. of 1862, the fifth section of the Revised Statutes was re-enacted, with the exception of the third subdivision, which was altered so as to read as follows: "Third, when perpetrated in committing the crime of arson in the first degree;" and to this was added the following provision as to murder in the second degree: "Such killing, unless it be murder in the first de-

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gree, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, or when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree." The killing, to constitute murder under the third subdivision, was confined to the crime of arson in the first degree, and the last clause included in murder in the second degree cases where the killing was perpetrated without any design to effect death.

The statute of 1873 was then passed, which is precisely like the statute of 1876, already cited, except that the words "without any design to effect death" are omitted in the latter statute. The evident purpose of omitting these words was to make any killing, while engaged in the perpetration of a felony, murder in the first degree, no matter what the design was, or whether it was intentional or casual. So that a person engaged in the commission of the crime of arson, burglary, rape or any other felony, who killed another, was chargeable with murder in the first degree. Under all of these various provisions, where the killing was perpetrated, it was of no consequence what the intention was. The statute was aimed against any killing by a criminal while committing any of the felonies enumerated, and the last amendment while engaged in the commission of any of the numerous felonies known to the law. The striking out of the words "without any design to effect death" was no doubt designed to avoid any necessity of showing that there was no such intention, and to make the law more explicit and clear. From a careful examination of these provisions it follows that if the prisoner was engaged in the commission of the crime of rape, and death ensued by reason thereof, no matter whether the deceased came to her death by strangulation, or by means of any other force or violence employed for the purpose of accomplishing his object, he was guilty of murder in the first degree, within the third subdivision of section five of the statute.

We have been referred, by the counsel for the prisoner, to several reported cases, which, it is claimed, uphold the doctrine that a killing, while engaged in the crime of rape or other offense, resulting directly from the force and violence employed, and constituting an ingredient of the offense, is not embraced within the third subdivision. *People v. Rector*, 19 Wend. 569; *People v. Butler*, 3 Park. Cr. Rep. 377; *Foster v. People*, 50 N. Y. 598. We have carefully examined these decisions, and none of them present the point now

considered. *People v. Rector* arose upon a conviction on an indictment for murder, and BRONSON, J., in some remarks, in a dissenting opinion, explaining the meaning of the statute as to manslaughter, holds that section six (2 R. S. 661) applies to that class of cases where the accused, while engaged in the commission of some other crime or misdemeanor, kills a human being by accident or misadventure, and without any intent to do him bodily injury, and has no application where an attack, with or without an intent to kill, is made upon a particular individual. The same doctrine appears to have been sanctioned in *People v. Butler*, in the Supreme Court. These views have not, however, been sustained, and they are adverse to a majority of the court in the case first cited; have been repudiated and are contrary to the opinions expressed by other distinguished judges. See *Darry v. People*, 10 N. Y. 161; *Fitzgerrold v. People*, 37 id. 413; 5 Trans. Appeals, 173; *Dolan v. People*, 64 N. Y. 485; *People v. Van Steenburgh*, 1 Park. Cr. Rep. 39. In *People v. Foster, supra*, it is stated that the question has never been determined by the court of last resort. The opinion herein of the General Term, by FOLLETT, J., discusses very fully the bearing of the decisions cited, and further elaboration is not required. As the question now considered was not distinctly passed upon, they do not demand more particular consideration. But whatever views may have been entertained in other cases, we are of the opinion that under the circumstances presented in the case at bar, there was no error in the charge of the judge, and that within the third subdivision of the statute, the prisoner was properly convicted of murder in the first degree.

[Omitting minor points.]

We are of the opinion, therefore, that the judgment was right and must be affirmed; and that the proceedings must be remitted to the court below, to proceed as required by law.

Judgment affirmed.

All concur.

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FLYNN V. EQUITABLE LIFE INSURANCE CO.

(78 N. Y. 568.)

Insurance — life — medical examiner — filing of application — estoppel — onus.

The defendant's medical examiner, at the request of an agent of the defendant who had acted to some extent as general agent and occupied defendant's principal office, filled up an application for life insurance. The applicant made correct answers, but the medical examiner incorrectly and untruly stated some of them in the application. *Held*, that in the absence of evidence on the part of the defendant to show the true authority of the agent, a finding that he was authorized to depute the medical examiner to fill up the application, was justified, and defendant was estopped from taking advantage of the mistakes.*

ACTION on a warranty policy of life insurance. The application was filled out by Dr. Vedder, a medical examiner for defendant, to whom Corey, one of its agents, had sent the blank application with instructions to take the application. The opinion states the other facts. The plaintiff had judgment below.

Charles B. Alexander, for appellant. The court erred in submitting to the jury the question whether Dr. Vedder acted as the agent of the defendant in taking the application and directing answers. *Howard v. Smith*, 33 Supr. Ct. 124; *Stone v. Browning*, 68 N. Y. 598; *Denny v. Williams*, 5 Allen, 5; *Howard v. Borden*, 13 id. 299; *Harris v. Wilson*, 1 Wend. 511; *Small v. Smith*, 1 Den. 586; *Storey v. Brennan*, 15 N. Y. 526. As medical examiner Vedder could not change the contract, estop the defendant, nor waive the effects of a fraud. *Foot v. Ætna L. Ins. Co.*, 61 N. Y. 571; *Valton v. Nat. Ins. Co.*, 1 Big. Cas. 453, note; *Nat. L. Ins. Co. v. Minch*, 53 N. Y. 151; *Vose v. Eagle Ins. Co.*, 6 Cush. 42; *Flynn v. Equitable Ins. Co.*, 67 N. Y. 500; s. c., 23 Am. Rep. 134. Knowledge by the agent of the falsity of the warranty would not relieve the insured from the consequence of a breach, nor would the action of the agent in writing false answers bind or estop the company. *Rohrbach v. Germ. Ins. Co.*, 62 N. Y. 47; s. c., 20 Am. Rep. 451; *Barbeau v. Phoenix Ins. Co.*, 67 N. Y. 595; *Van Schoick*

 * See same case 67 N. Y. 500; 23 Am. Rep. 134.

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v. *Ins. Co.*, 68 id. 438; *Ins. Co. v. Martin*, 11 Vroom, 569; s. c., 29 Am. Rep. 271; *Ryan v. Ins. Co.*, 41 Conn. 168; *Ins. Co. v. Wolff*, 5 Otto, 331; *Lochner v. Home Ins. Co.*, 17 Mo. 247. Cory could not delegate his trust. *Hawley v. James*, 5 Pai. 323; *Lyon v. Jerome*, 26 Wend. 485; *In re Bleakley*, 5 Pai. 311; *Coles v. Trecothick*, 9 Ves. 234; *Stone v. State*, 12 Mo. 400; *Lewis v. Ingersoll*, 3 Abb. Ct. App. 55; *Grinnell v. Buchanan*, 1 Daly, 538; 2 Kent Com. 597. The declarations of an agent do not establish his agency. *Fairlie v. Hastings*, 10 Ves. 126; *Streeter v. Poor*, 4 Kans. 412; *Mapp v. Phillips*, 32 Ga. 72; *Brigham v. Peters*, 1 Gray, 139; *Stringham v. St. N. Ins. Co.*, 4 Abb. Ct. App. 315. Even if Cory was a general agent, the applicant had notice that to him he was a special agent with limited power (*Munn v. Commission Co.*, 15 Johns. 54; 8 Am. Dec. 219), and he could not go beyond the apparent scope of his authority. *Beals v. Allen*, 18 Johns. 366; 9 Am. Dec. 221; *Rossiter v. Rossiter*, 8 Wend. 494; *Scott v. McGrath*, 7 Barb. 53.

Robert Payne, for respondents.

CHURCH, C. J. The principle that a party seeking to rescind a contract for fraud must return what he has received, has no application to this case.

The plaintiffs have brought an action upon a contract entered into between the deceased and the defendant. The defense is that the contract has been violated by the intestate, and hence no action can be maintained upon it. The plaintiffs are seeking to enforce the contract, and performance on the part of their intestate is a condition of a right to recover. The right to a return of the premiums paid is not necessarily involved in the action. The plaintiffs must establish a cause of action upon the contract. If they fail to do this they cannot recover, irrespective of the question whether they are entitled to a return of the premiums or not. A very material point in the case is whether the evidence was sufficient to justify the submission to the jury of the question whether Dr. Vedder is to be regarded as the agent of the company, to take and receive the application for insurance, and hence that the latter is chargeable with his acts and omissions in performing that duty. When the case was here before (67 N. Y. 500), it was held that such agency did not appear; that as medical examiner he had no authority to take the application, or to bind the company by any

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act in connection with it. On the last trial it is claimed that additional and sufficient evidence was given to justify the submission of the question to the jury, and to warrant a finding in favor of the plaintiff. It would have been more satisfactory if the real facts bearing upon the question had been presented, so that the court and jury could have arrived at a reasonably certain conclusion upon it, but both parties seemed disinclined to produce the evidence presumably within their power, and we must grope our way as best we can by such meager light as the parties have seen fit to furnish. It is not disputed that Dr. Vedder was the authorized medical examiner of the company, and made the medical examination upon which the policy was issued. He was never appointed by the company agent to solicit or receive applications. The evidence relied upon to warrant the inference that he had authority to take this application, is that he received the blank application from one Cory, who requested him to take the application. Cory was an agent of the company, but it is disputed that he had power to appoint sub-agents or to delegate his own powers. He is recognized as agent in the policy itself. One condition is "that this policy shall not be binding until delivered by the society's cashier, or by its agent A. B. Cory," to which is attached a certificate signed A. B. Cory, that he had received the premiums and delivered the policy. Indorsed upon the policy under the head of "notice to the assured," it is stated that the duties of agents are simply the reception and transmission of policies and premiums under instructions of the society. From this it might be inferred that the designation of Cory as an agent implied no more than an ordinary soliciting agent, and as such he would have no power to delegate his authority, and the company would not be bound by any delegation he might make unless they knew of and ratified his acts. Circumstances were shown from which it is claimed that an inference may be drawn that he had more than the power of a common soliciting agent. This consists of some correspondence with Vedder, in which he approves of the manner of filling up the application of Flynn, and requests him in substance to interest himself in taking other applications, and specifies his compensation. Nothing is said expressly about appointing him agent, but the letters may be regarded to some extent as negotiations on Cory's part for his acting as such. In addition to these letters an envelope is produced, in which was inclosed a letter from Cory to Vedder, on the back of

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which is printed a direction to the postmaster to return it to the company if not called for, and an envelope is produced which had been sent by Cory for Dr. Vedder to use, on the back of which in lithograph is the name of Cory, described in printing as the general agent of the company. Dr. Vedder at first testified that he had received payment for taking the application, but upon the production of a receipted bill it seems that it was only for the medical examination. Upon the first trial some of these circumstances were shown, but not as fully as upon the last, and it did not appear how Dr. Vedder got the application. It is argued that Cory as a simple soliciting agent had no power to delegate his authority, and that the additional evidence produced to show that he was a general agent are the acts of Cory only, and that he cannot establish either his agency or authority by asserting it, or by his acts unless they are ratified by the principal with knowledge. On the other hand it is insisted that the inference is a legitimate one, either that Cory had sufficient power to authorize Vedder to take this application for the company, or that the company knew of and approved his acts in respect to it, and the facts that letters written by him imported to come from the defendant's principal office in New York, and letters were addressed to him at such office, in blank envelopes sent out by him, tend to show that he transacted business in that office, and that his acts in respect to this policy which was issued by the company were known to it, and were approved by it. While this evidence is far from conclusive, and may be regarded as slight, we are inclined to think the conceded fact that he was an agent of the company, with the other circumstances alluded to, were sufficient to cast the burden upon the defendant of showing the real facts, and upon its failure to do so, to justify an inference against it. Cory was not produced, and no reason is shown why not. Presumably it was in the power of the company to produce him, and the company had the power to show precisely what authority Cory possessed, and failing to do this, it cannot complain that adverse presumptions should be indulged. Cory was confessedly an agent; he held himself out and acted to some extent as a general agent, and he appeared to be an occupant of the company's principal office. We think that the onus was fairly cast upon the defendant to show the real truth or take the consequences which the law infers from the omission.

The defense interposed was a breach of warranty by the assured,

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contained in several answers to the questions propounded to him in the application. These answers are made warranties by the terms of the policy, and are to be regarded as such. Some of the answers were not strictly true, and the presiding judge charged the jury that unless the company was bound by the acts of Dr. Vedder in preparing the answers, the defendant was entitled to a verdict. It seems that the interrogations were read by Dr. Vedder to the assured, and upon receiving the answer of the assured to the respective questions, he wrote the answers to the interrogations in the application himself, and that the assured did not see the answers as written.

[Omitting details of evidence.]

In short, the evidence * * * tends to show that the assured stated substantially the truth in respect to his physical condition, and the diseases and ailments with which he had been afflicted, and that he wrote the answers as he thought was right, and that it was done in good faith. Dr. Vedder had been the physician of the assured, and his family, for many years, and was then acting in the double capacity of medical examiner and agent for the company to take the application, and it was natural that his advice in respect to medical questions should be taken by the assured, and if he answered the questions truly, in the absence of fraud or collusion, the dictates of justice as well as the established rule in this State absolve the assured from responsibility for any errors or mistakes which the agent of the company may have made in writing down the answers, and that the company is estopped from denying the truth of the answers. The acts of its agent within the scope of his authority are regarded as its acts, and the other party having acted upon them, it cannot deny them. This was substantially charged by the judge, and there was no error in the charge in that respect. Whatever apparent conflict there may have been (and the conflict is more apparent than real) the more recent cases and the great weight of authority have settled the rule here indicated. *Plumb v. Ins. Co.*, 18 N. Y. 392; *Rowley v. Ins. Co.*, 36 id. 550; 3 Keyes, 557; Bliss on Life Ins., §§ 280-291, and cases cited; *Merserau v. Ins. Co.*, 66 N. Y. 274; *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; s. c., 9 Am. Rep. 235; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; s. c., 9 Am. Rep. 479, and cases cited; *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331; *Boos v. Ins. Co.*, 64 N. Y. 236; *Baker v. Ins. Co.*, 64 id. 648; *Ins. Co. v. Wilkinson*, 13 Wall, 222; *Ins. Co. v. Mahone*,

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21 id. 152. In the language of ALLEN, J., in *Baker v. Ins. Co.*, *supra*, "If true answers were given by the applicant to the agent of the defendant, by whom the application was filled out, and the answers reduced to writing, but the agent for any reason modified or varied the answers, so as to give them a different meaning from the answers actually given by the applicant, the defendant would be estopped from challenging the correctness of the answers as modified and written by the agent." The general current of authority is to the same effect.

I am aware that there are respectable authorities holding a contrary doctrine, and notably *Ins. Co. v. Martin*, 11 Vroom, 569; s. c., 29 Am. Rep. 271; but the learned court criticises not so much the principle as the rule allowing such evidence in a court of law. The court holds that the contract should first be reformed in a court of equity, and then an action at law brought upon it.

There would be difficulty in reforming a contract, the terms of which were prescribed by the defendant himself, but if reformation was practicable, and the answers were written truly, the defendant would not be benefited, because it would then be unable to prove a breach of the warranty. The only difference is that in one case the result is reached by one law suit, and in the other, two are required. Many of the distinctions between courts of law and equity as to the admission of evidence have necessarily become obliterated when these jurisdictions are blended, and are exercised by the same tribunal. In principle, written instruments can have no greater sanctity in courts of law than in courts of equity, and when authority exists for administering justice in either court there is no sound reason why the evidence for that purpose should not be received in either court. Nor is any reason perceived why the principle of an *estoppel in pais*, should not be applied. An insurance company in receiving answers to the numerous interrogatories put to the assured, covering every conceivable phase of every human disease, are presumed to understand the subject better than the assured, and if truthful answers are given, and if the answers are then written by it, according to its own construction, and omissions or mistakes are made by it, or under its advice, it, and not the assured ought to bear the consequences. By this means they have induced the assured to enter into the contract, and part with his money to pay premiums, and it is too late when the company is called upon to perform the contract on its part, to set up its own acts, mistakes,

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or blunders as a defense, and it is estopped from showing that the answers are not true.

[Omitting other matters.]

The judgment should be affirmed.

Judgment affirmed.

All concur, except EARL, J., dissenting.

HURD V. KELLY.

(78 N. Y. 588.)

Bond — consideration — public policy — ultra vires — maturity.

A bond was executed by several for the several payment of a certain sum to a certain savings bank, on a specified day, "or six months after a demand therefor." The bank was embarrassed at the time, and the real purpose of the bond, which was known to the obligors, was exhibition to the bank department as an asset, and to enable the bank to pass examination and continue in business. The expressed consideration was that the bank should continue in business after the execution of the bond. The bank did continue in business for some time, but not until the specified day of payment, and then failed, and was put in the hands of a receiver. *Held*, (1) that the transaction was not against public policy; (2) that it was not *ultra vires* as to the depositors represented by the receiver; (3) that it was upon a valid consideration; (4) that an action was maintainable upon six months' notice and before the specified day of payment.

ACTION by the receiver of the Third Avenue Savings Bank on a bond executed by defendant and others. The opinion states the facts.

William A. Beach, for appellant. The bond is without consideration and void. *Devlin v. Brady*, 36 N. Y. 534; *Bliss v. Matteson*, 52 Barb. 348; *Hope M. L. Co. v. Perkins*, 38 N. Y. 404; *Same v. Weed*, 28 Conn. 51; *Tilden v. Mayor*, 56 Barb. 340; 1 Pars. on Cont. (6th ed.) 452; *Barnes v. Perrine*, 12 N. Y. 18; *Richmondville Sem'y v. McDonald*, 34 id. 379. The court erred in excluding proof that defendant signed upon the representation by the authorized trustees, on behalf of the bank, upon which defendant relied, that the bond was not needed as an asset in the ordinary and gen-

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eral business of the bank. *Davis v. Bemis*, 40 N. Y. 453; *Baldwin v. Burrows*, 47 id. 214; *N. Y. and N. H. R. R. v. Schuyler*, 34 id. 30-50; *Ripley v. Hazelton*, 3 Daly, 329; *Warner v. Blakeman*, 4 Keyes, 487; *Phillips v. Conklin*, 58 N. Y. 682; *Waldron v. Stevens*, 12 Wend. 100; *Devoe v. Brandt*, 53 N. Y. 462; *Beardsley v. Duntley*, 69 id. 577; *Lincoln v. Fitch*, 42 Me. 456; *Devendorf v. Beardsley*, 23 Barb. 659; *Osgood v. Toplitz*, 3 Lans. 184. The circumstances imposed upon defendant no duty of active vigilance and care. *Baker v. Spencer*, 47 N. Y. 562; *Brown v. Post*, 1 Hun, 303; affirmed, 62 N. Y. 651; *Baker v. Spencer*, 67 id. 304. The bond is illegal and void as against public policy. Story on Cont., § 1; *Bissell v. Michigan, etc., R. R.*, 22 N. Y. 285; *Pullan v. Cincinnati R. R.*, 4 Biss. 35; *Crocker v. Whitney*, 71 N. Y. 161; *Osgood v. Laytin*, 3 Abb. Ct. App. 418; *Basshor v. Dressel*, 34 Md. 503; *N. Y. Trust and Loan Co. v. Helmer*, 12 Hun, 35; *Whitney Arms Co. v. Barlow*, 63 N. Y. 69; s. c., 20 Am. Rep. 504; Brice *Ultra Vires* (2d ed.), 68; *Tracy v. Talmage*, 14 N. Y. 162; *Rawlins v. Wickham*, 3 DeG. & J. 304; *Ships case*, 2 DeG. J. & S. 544. It was without consideration. *Agricultural Bk. v. Robinson*, 24 Me. 277; *Lime Rock Bk. v. Hewett*, 50 id. 267; *Cook v. Shipman*, 51 Ill. 316; *Gray v. Hook*, 4 N. Y. 449; *Burrows v. Smith*, 10 id. 550.

A. J. Vanderpoel, for respondent.

ANDREWS, J. The objections to the recovery in this case will be briefly considered. It is claimed that the bond was not due at the time of the commencement of the suit. This turns upon the construction of the instrument. The bond was executed by several obligors who bound themselves severally, in separate amounts each for himself, and not for the others, to pay to the bank a sum specified "on the first day of January, one thousand eight hundred and eighty-three (1883), or six months after a demand therefor," the aggregate undertaking of all the obligors amounting to the sum of \$100,000. The counsel for the defendant insists that the obligors had a right to pay the bond on the first day of January, 1883, but that the bank could only require payment after a demand of six months terminating at that date or any subsequent period. We do not think this construction admissible.

The general rule is that when the condition of an obligation is in the disjunctive it may be discharged by the performance of either

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of the enumerated acts at the election of the obligor. This is ordinarily consistent with the language and design of the instrument, but it is entirely competent for the parties to give the election to the obligee, and when the language of the instrument gives to the latter the right to demand payment or enforce performance in either of two ways, there is no arbitrary rule which prevents effect being given to it. Mr. Justice STORY in *U. S. v. Thompson*, 1 Gal. 389, in speaking of the general rule to which we have adverted, says: "An exception to the rule is when the parties have saved the election to the other party." We think it is quite clear from the language of the bond in question that the intention was to fix the first day of January, 1883, as the day upon which the obligation should mature, in the absence of any prior demand of payment by the bank, but at the same time to enable the bank to accelerate the time of payment by six months' demand, if earlier payment was deemed necessary or required. The circumstances under which the bond was executed confirm this construction. It appears that when the bond was given the assets of the bank had become impaired to an amount as great or greater than the amount of the bond. The bond was executed for the purpose of being exhibited to the bank department as an asset so that the bank might pass the examination and inspection of the department and be enabled to continue its business. Under these circumstances it was quite natural that the bond should be drawn so as to make it available for the use of the bank within a short time in case of an emergency and the obligors probably deemed themselves sufficiently protected against being called upon for payment before payment was needed, by the fact that the most of the obligors were trustees of the bank, and their interests would be adverse to such action. We are of opinion that the bond was payable six months after demand of payment by the bank, made at any time after its execution.

It is also claimed that the bond was void for want of consideration. This objection is untenable. The bond is dated on the 28th of December, 1872. The undertaking of the several obligors is stated therein to be upon the consideration that the bank upon the request of each of the obligors, continues its ordinary business after the 15th day of January, 1873, and of the mutual covenants contained in the instrument. The bank did continue its business until the 6th day of December, 1875, when a receiver was appointed. The continuance of its business and the incurring of new obliga-

tions by the bank, incident to such continuance, was a good consideration. The bank, if solvent, was not bound to continue its business and enter into new obligations. If, on the other hand, the bank was insolvent, it was not bound to discontinue its business so long as there was a fair expectation that its losses might be retrieved under a better management and under more hopeful and prosperous conditions. It may have been unwise for the bank to have continued the struggle after the losses it had incurred but having undertaken to continue its business at the request of the obligors, there was ample consideration for their promise. Nor do we perceive that the transaction was in violation of public policy. The intention of the parties was to provide a security in the nature of a guarantee fund of \$100,000, to enable the bank to continue its business. It is not claimed that the transaction was *ultra vires*, and if it was, that objection cannot prevail against the claims of depositors who are represented by the receiver and who is seeking to collect the bond as an asset of the bank, for distribution among those for whose protection it was given. *Hope Ins. Co. v. Perkins*, 38 N. Y. 404; *Whitney Arms Co. v. Barlow*, 63 id. 62; s. c., 20 Am. Rep. 504; *Railway Co. v. McCarthy*, 96 U. S. 258.

The defense that there was a fraudulent concealment by the persons who solicited the defendant to sign the bond of the true condition of the bank, was, under the circumstances of this case, no answer to the action. It appears from the defendant's answer that he was informed, when he executed the bond, that it was to be used in reference to the relations of the bank to the banking department, "so that a better showing of the apparent assets of the bank would appear." The defendant was thus apprised that this bond was to be used to give credit to the bank, with the bank department and with the public, so that it should be enabled to continue its business. The fact communicated to him was notice that the bank was in a precarious condition. He knew that if the bond was treated as an asset and the bank thereby allowed to continue its business, new obligations to depositors would be entered into on the faith of the solvency of the institution. Under such circumstances it would be gross injustice to permit the defendant, after having aided the bank to procure credit with the community, to avoid, as against depositors and creditors, the payment of his bond on the allegation that the exact condition of the bank was not disclosed to him, or that it was much worse than was represented.

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The dealings between him and the officials of the bank, at whose request he signed the bond, ought not in justice to be allowed to affect the security given by him for the protection of those dealing with the bank and who must be presumed to have relied thereon in their dealings. It was the duty of the defendant to have inquired and ascertained the condition of the bank before signing the bond, and having allowed the bond to be treated as an asset for three years and the public to deal with the bank on this assumption until the bank has become insolvent, he is estopped from setting up the defense in question. *Farrar v. Walker* (MILLER, J.), 8 Dill. 510; *Casoni v. Jerome*, 58 N. Y. 315; *McWilliams v. Mason*, 31 id. 294.

[Omitting an immaterial point.]

Upon the whole case we are of opinion that the judgment is right and should be affirmed.

Judgment affirmed.

All concur.

CASES
IN THE
SUPREME COURT
OF
OREGON.

SINGER MANUFACTURING COMPANY V. GRAHAM.

(8 Oreg. 17.)

Sale — what is not — monthly payments.

An agreement for the hire of a sewing machine at a specified rent payable monthly, the machine to belong to the hirer when a certain sum is paid, is not a sale, and the hirer cannot confer title on one who in good faith undertakes to purchase it from him.*

ACTION to recover the value of a sewing machine. The opinion states the case. The plaintiff had judgment below.

Weatherford & Blackburn, N. B. Humphrey and W. G. Piper,
for appellants.

Conley, & Hewitt and Dolph, Bronaugh, Dolph & Simon, for
respondents.

KELLY, C. J. This action was brought in a justice's court to recover the value of a sewing machine alleged to be the property of the respondent, and alleged to be wrongfully detained by the

* See *Latham v. Sumner* (89 Ill. 233), s. c., 31 Am. Rep. 72, and note, 81.

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appellants and converted to their own use. Judgment was there rendered in favor of the respondent, from which an appeal was taken to the Circuit Court, and upon trial that court rendered a judgment also in favor of the respondent.

[Omitting an unimportant matter.]

The complaint is in substance as follows: That the said plaintiff is a corporation formed under the laws of New York and New Jersey, and doing business in this State as a corporation. That on or about the 11th day of June, 1878, in the county clerk's office of the county of Multnomah, the said corporation filed a power of attorney appointing one Willis B. Fry, who is a citizen of the United States, and a citizen and resident of the State of Oregon, its legal attorney in fact, etc. That on or about the 15th day of July, 1878, said plaintiff was the owner and entitled to the possession of one Singer sewing machine valued at sixty-five dollars; that on said 15th day of July, 1878, the said plaintiff gave one of the said defendants, to wit, Frank Morgan, the possession of said sewing machine, upon the terms and in accordance with the conditions and agreements expressed in a contract of which the following is a copy, to wit:

“HARRISBURG, Oregon, *July* 15, 1878.

“Received from the Singer Manufacturing Co., corner First and Yamhill streets, Portland, Oregon, one new No. 4 medium sewing machine, No. 1,937,680, value, sixty-five dollars (\$65.00), U. S. coin, on hire at ten dollars (\$10), U. S. coin, per month, payments to be made monthly in advance. I hereby agree not to remove the machine from my residence, situate in or near Harrisburg, Linn county, Oregon, without the consent of the Singer Manufacturing Company. And I also agree to pay the monthly installments punctually; or failing in either of the above, I agree to relinquish all claims on the above machine, and to return it, or cause it to be returned, to the Singer Manufacturing Co., at my own expense; and if I sell, loan, or otherwise dispose of the above machine, I hold myself liable to the full penalty of the law.

(Signed name in full.)

“FRANK MORGAN.

“NOTE.—When \$65 U. S. coin, the value of this machine, has been paid, the machine with this contract shall belong to Frank Morgan. For a valuable consideration, received from the Singer

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Manufacturing Co., I hereby guaranty the faithful performance of the within contract made this day by ———,

“Dated this 15th day of July, 1878.

“JNO. A. BROWN, Agent.”

That said Morgan paid the company in all twenty-five dollars; that he has failed to perform the conditions of his contract; that said Frank Morgan, on or about the 2d day of January, 1879, for the purpose and with the intent to defraud this plaintiff, gave the possession of said machine to the said defendants W. R. Graham and Richard Graham, and that said defendants W. R. Graham and Richard Graham well knew the conditions of said contract with the defendant Frank Morgan, and that they took the same for the purpose of defrauding this plaintiff. That the said defendants have wrongfully and willfully converted said property to their own use, to the damage of this plaintiff in the sum of sixty-five dollars. That on or about the ——— day of January, 1879, the plaintiff demanded of said defendants that they return to him the possession of said sewing machine, but they refused, and still refuse, to give up the possession of said property.

Wherefore plaintiff demands judgment, etc.

To this complaint the respondent demurred, upon the following grounds:

1. The court has no jurisdiction of the persons of these defendants, or the subject-matter of the action.
2. The plaintiff has no legal capacity to sue.
3. There is a defect of parties defendant.
4. The complaint does not state facts sufficient to constitute a cause of action against the defendants.
5. The contract set forth in the complaint is contrary to the policy of the law, and void as to these defendants.

[Omitting other points.]

By the terms of the agreement the sewing machine was to continue to be the property of the respondent, and was merely hired to Morgan for ten dollars per month, payable monthly, with the right of respondent to have it returned in case of a failure to pay the monthly installments as they became due. It was further agreed that whenever the sum of sixty-five dollars should be paid in this way the machine should then become the property of Morgan. There is no doubt it was the intention of both parties to the

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contract that the title to the sewing machine was to remain in the respondent until sixty-five dollars should be paid, and then, and not before, it was to become the property of Morgan. It was only a conditional sale, accompanied by the possession, which Morgan was permitted to retain until the condition was broken. Under these circumstances he had no right to sell the property, and the appellants, although *bona fide* purchasers, acquired no better title than Morgan had. This is too well settled now to admit of any doubt. *Ballard v. Burgett*, 40 N. Y. 314; *Enlow v. Klein*, 79 Penn. St. 488; *Hirschorn v. Carmley*, 98 Mass. 149; *Kohler v. Hayes*, 41 Cal. 455; Benjamin on Sales, § 320, and note *d*. The complaint contains a sufficient allegation that the respondent demanded the return of the property by appellants, and that they refused to return it, but converted it to their own use.

The judgment of the court below is affirmed.

Judgment affirmed.

DICE V. WILLAMETTE TRANSPORTATION AND LOCKS COMPANY.

(8 Oreg. 60.)

Carrier — negligence — passenger on steamboat — going ashore before reaching destination.

A passenger for hire on a steamboat, attempting to go ashore before reaching his destination, sustained personal injury from the carrier's negligent omission to provide lights. *Held*, that the carrier was liable.

ACTION for personal injury. The opinion states the case. The plaintiff had judgment below.

Hill, Durham & Thompson, for appellant.

Ben Hayden, Knight & Lord, for respondent.

PRIN, J. This action was brought to recover damages for injuries sustained, as is alleged, through the negligence of the agents and servants of the appellant. The appellant was a corporation and the owner and proprietor of a steamboat named the "Occi-

dent," which was employed by the appellant in conveying passengers and merchandise on the Willamette river, from Portland to Independence, Oregon, for hire; and was also the owner and proprietor of a wharf at the foot of Trade street, in the city of Salem, Oregon. The appellant received the respondent into its said boat for the purpose of carrying him safely therein as a passenger from Portland to Independence, Oregon, for the usual fare. That before reaching Independence the appellant stopped its said boat at its wharf in the city of Salem, on the night of the 7th day of December, for the purpose of discharging its freight and passengers. That while it was so stopped and employed in landing its passengers, the respondent, having occasion to go ashore on business, in passing from said boat to the wharf, stepped off the boat and fell, breaking his right arm and sustaining other injuries. That the night was dark and rainy, and there were no lights on the boat and wharf, or none sufficient to enable the respondent to see plainly his way ashore. The respondent was without blame, unless going ashore at that place without permission of the appellant shall be considered such. A judgment was recovered against the appellant in the court below, from which an appeal is taken to this court.

The theory of the appellant is that respondent having employed the company to carry him safely from Portland to Independence, should have remained on the boat without going ashore at any intermediate point until the boat reached his place of destination. That when its boat stopped at its wharf at Salem for the purpose of discharging its freight and passengers, it was not obliged to furnish the respondent a safe means of egress from its boat to its wharf, although he may have had business ashore at that point; that his attempt to go ashore there was at his own risk, and that the appellant was not responsible for any injury that may have resulted to him in consequence of the accident.

At the trial of the case the court was requested by the appellant to instruct the jury as follows: "If you find that the plaintiff took passage on the defendant's boat at Portland for the town of Independence, and that he attempted to land at a way port without the permission of the defendant, then in so doing he was not a passenger, but took upon himself the risk of receiving injury in landing from and returning to the boat, and he cannot recover in this action unless you find such negligence on the part of the defendant as would render it liable to a person not a passenger."

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The refusal of this instruction is the principal ground of error complained of by the appellant.

To sustain this proposition the appellant cites the case of *State v. Grand Trunk Railway Company of Canada*, 58 Me. 176; s. c., 4 Am. Rep. 258. While the syllabus of that case sustains the proposition, the facts of the case are not at all analogous to the one under consideration. That was a criminal case, and the indictment charged the company with negligently and carelessly running their locomotive against one Pullen, by means whereof he was killed. He had purchased a ticket at Auburn for Portland. The train turned out on the side track at an intermediate point to await the express train from Portland, which was behind time. The deceased got off the car while it was standing there, crossed the main track and went behind the water tank for a necessary purpose. While there the express train signaled its approach and the conductor of the waiting train gave the usual notice for passengers to resume their seats, which the deceased did not hear, but did hear the double whistle, and thereupon rushed from behind the water tank, but not seeing the approaching train on account of the intervening water tank, undertook to recross the main track, when he was struck by the engine of the express train and so injured that he died in a few hours. Thus it will be seen that the train had not stopped at a depot for the purpose of discharging its passengers, nor was the deceased injured on account of the means of egress and ingress to the car being in any way defective and unsafe, nor does it appear that there was any negligence on the part of the agents and servants of the company. If the respondent in the case had been injured by another boat running against him after he had safely reached the wharf, it would have been an analogous case.

A case is cited on the other side which appears to be in point. *Montgomery and West Point Railroad Company v. Boring*, 51 Ga. 582. One Boring took passage on the road of said company at Columbus, Georgia, to be carried to West Point, Georgia, for the usual fare. The train was stopped on the track at an intermediate point from half an hour to an hour in the night time, to await the arrival of another train of the company, to convey its passengers to its destination. The train stopped over an open ditch six or eight feet deep, at the bottom of which there were rocks and timbers, which ditch was known to the conductor but unknown to the passengers. There were no stationary lights by which it could be seen

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by him. While the train was standing there the passenger stepped out of the car, and was precipitated into the ditch and had his leg broken and was crippled for life. In that case it was held by the court that he had the right under the circumstances to step out of the car, and that the company was liable for damages for the injuries resulting to him, on the ground of negligence.

Under the facts and circumstances of the case under consideration we are of opinion that the respondent had the right to go ashore at Salem, and that appellant was obliged, through its agents and servants, to provide him a safe means of egress from the boat to its wharf. It follows from this conclusion that it was not error to refuse the instruction requested.

The judgment is affirmed, with costs.

Judgment affirmed.

FINDLEY V. HILL.

(8 Oreg. 247.)

Surety — discharge — extension — failure to sue principal on request.

The payee and holder of a promissory note agreed with the principal maker, without the consent of the surety, to extend the time of payment "until after harvest." *Held*, not to discharge the surety, because too indefinite.

If a creditor fails to sue his principal debtor, when solvent, at the request of the surety, and he afterward becomes insolvent, still the surety is not discharged. (*See note, p. 580.*)

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

W. G. Piper, Bonham & Ramsey, for appellant.

R. S. Strahan, A. C. Sweet, and Daly & Gaby, for respondent.

PRIM, J. The defense set up in the separate answer of the appellant is, that he signed the note upon which the action is based, as surety only of the defendant Hill, and that the respondent had full knowledge of that fact at the time said note was executed, although the word "surety" was not appended to his signature.

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That the respondent, without the assent of the appellant and against his protest, entered into an agreement with the defendant Hill, by the terms of which the said Hill should have an extension of time for the payment of the note until after the harvest of 1879, in consideration that said Hill should then pay the amount due upon the note in wheat, when the same should be harvested. If this was a valid agreement it is quite clear that it operated as a discharge of the appellant, for it is well settled that where time is given to the principal debtor without the assent of the surety, by a valid agreement which ties up the hands of the creditor, the surety is discharged. *Bangs v. Strong*, 7 Hill, 250.

But in this case we think the agreement for the extension of time was invalid, for the reason that the time to which the payment was extended was indefinite and uncertain, and for the lack of any consideration to support it. In *Miller v. Stem*, 2 Penn. St. 286, it was held that "to discharge a surety by extension of the time of payment, there must be not only a sufficient consideration, but the time must be definite; hence an agreement to delay for an uncertain period, as until sometime in the summer, will not discharge him." Chitty on Bills, 412, 414; 3 Penn. St. 440. The agreement to pay in wheat after harvest was equivalent to saying that if the creditor would wait until after harvest he would pay the amount due on the note; hence there was no consideration to support the promise, and until "after harvest" was indefinite and uncertain.

The other defense set up in the separate answer of the appellant was, that on or about the 2d day of January, 1879, when the said Hill was solvent, he (Scrafford) notified and requested respondent to proceed to collect said note without delay, which he neglected to do until October 6, 1879, at which time said Hill was, and ever since has been, insolvent. The legislatures of many of the United States have by statute provided that the surety may by notice require the creditor to proceed against the principal, but our legislature having failed to adopt any such provision, the rule of the common law prevails in this State. Mr. Brandt, in his work on Suretyship, section 208, says: "The great majority of cases on the subject hold, in the absence of any statutory provision, that if after the debt is due the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterward becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is, that the principal and

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surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal he may himself pay the debt and immediately sue the principal." *Jenkins v. Clarkson*, 7 Ohio, 72; *Carr v. Howard*, 8 Blackf. 190; *Davis v. Huggins*, 3 N. H. 231; *Nichols v. McDowell*, 14 B. Monr. 6; *Frye v. Barker*, 4 Pick. 382; *Gage v. Mechanics' Nat. Bank of Chicago*, 79 Ill. 62; *Dillon v. Russell*, 5 Neb. 484; *Inkster v. First Nat. Bank of Marshall*, 30 Mich. 143; *Hartman v. Burlingame*, 9 Cal. 557.

There being no error appearing in the record, the judgment of the court below is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In 1816 it was for the first time held, without argument, by the Supreme Court of New York, in *Pain v. Packard*, 13 Johns. 174, that if the surety call upon the creditor to collect the debt of the principal, and he disregard that request and thereby the surety is injured, as by the subsequent insolvency of the principal, the surety was thereby discharged.

A directly contrary decision was given by Chancellor KENT, upon argument and full consideration, the following year. *King v. Baldwin*, 2 Johns. Ch. 554. Two years later the last decision was reversed by the Court of Errors by the casting vote of the presiding officer, a layman, and against the opinion of a majority of the judges of the Supreme Court. This decision has ever since been followed in that State (*Remsen v. Beckman*, 25 N. Y. 552), although it has received the repeated condemnation of some of its ablest jurists, including Chancellor WALWORTH and Judges COWEN and HARRIS. *Warner v. Beardsley*, 8 Wend. 194; *Herrick v. Borst*, 4 Hill, 650; *Schroepell v. Shaw*, 3 Comst. 454.

In Pennsylvania, and for the avowed reason that they have no court of equity, they have followed the case of *Pain v. Packard*, with this limitation, however, that the notice to discharge the surety must not only contain a positive request to the creditor to sue the principal, but must contain a distinct notice that if he neglects to do so the surety will claim to be discharged. *Cope v. Smith's Executors*, 8 S. & R. 110; 11 Am. Dec. 582; *Gardner v. Gardner*, 15 Id. 28; *Greenawalt v. Kreider*, 3 Penn. St. 266; *Richards v. Com.*, 40 Id. 146; *Hancock v. Bryant*, 2 Yerg. 476; *Goodman v. Griffin*, 3 Stew. 160; *State Bank v. Watkins*, 1 Eng. 123; *Lang v. Brevard*, 3 Strob. Fq. 59.

But no English case can be found to sustain these decisions, and the weight of American authority is the other way. *Bellows v. Lovell*, 5 Pick. 310; *Davis v. Huggins*, 3 N. H. 231; *Page v. Webster*, 15 Me. 249; *Dennis v. Rider*, 2 McLean, 451; *Taylor v. Beck*, 13 Ill. 376; *Howard v. Brown*, 3 Ga. 523; cases cited in 1 Pars. on Notes, 226-7.

The following is an abstract of the recent case of *Hunt v. Purdy*, N. Y. Ct. Appeals:

F., who stood in the relation of a surety for the payment of a bond and mortgage not due, told plaintiff, who held the mortgage, in January or February, to "collect that mortgage in the spring, and not let it run over the time it is due." There was nothing due and payable until the 23d of May in that year. Held, not a sufficient notice to plaintiff to release F. from liability where plaintiff neglected to foreclose when the bond and mortgage became due. Plaintiff might well have understood defendant to mean that when the bond became payable payment should be asked, for he was not forced by the words used at the time when they were used to understand that collection by legal proceedings was meant. The doctrine that a surety may give the creditor notice to proceed against the principal, and if the latter refuses, to the damage of the surety, the obligation of the surety is discharged or diminished, is not a favorite in the law and is not accepted in all forums. 3 Kent Com. 124, note c. It was against opposition that it was adopted into the law of this State. See *King v. Baldwin*, 17 Johns. 284, 290, 294, 296, 297, 402; *Colegrove*

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v. *Tallman*, 67 N. Y. 95, 19; s. c., 25 Am. Rep. 90. It is not one that is to be applied with laxity. It is certainly to be required that the surety deal fairly and plainly with the creditor, and give him to know that he intends to put him upon his equitable duty. The notice to the creditor should clearly inform him that he is required to take proceedings in the courts to enforce the mortgage.

MORELAND V. BRADY.

(8 Oreg. 303.)

Evidence — parol — to explain will.

A testator devised lands in Portland as follows: To Margaret lot 2 in block 187, and to Esther lot 1 in block 187. He had no such lots. *Held*, that oral evidence was admissible to show that he did own lots 3 and 4 in that block, and that those lots would pass by the will.*

SUIT to quiet title. The opinion states the case. The plaintiff had judgment below.

Dolph, Bronaugh, Dolph & Simon, for appellant.

Wm. Strong & Sons, for respondent.

BOISE, J. This appeal is taken from a decree rendered by the Circuit Court for the county of Multnomah, in favor of the respondent and against the appellants. The suit was brought to quiet the respondent's possession and title to lot number three in block one hundred and eighty-seven, in the city of Portland, against Matthew Brady and George Brady, who sues by his guardian, James Wilson. The appeal is taken alone by Matthew Brady. The parties all claim to derive title from one Bernard Brady, late of Multnomah county, deceased.

The facts established by the evidence are as follows:

1. That Bernard Brady made his will on the 29th day of October, 1862, and died at the city of Portland, Oregon, on the 31st day of October, 1862. It was admitted to probate in the county court of the county of Multnomah on the 7th day of November, 1862, and his estate has been duly administered upon.

2. The fourth clause of his will is, so far as is material, as fol-

* See *contra*, *Sherwood v. Sherwood* (45 Wis. 359), 30 Am. Rep. 757.

lows: "As also a certain parcel of ground or lots in the city of Portland, and numbered as follows, to wit: No. block, 187, one hundred and eighty-seven, lot No. (2) two, I bequeath to Margaret McGill."

3. Sixth clause of will: "I also bequeath to my sister, Esther Brady, that lot or parcel of ground, in the city of Portland, as here described, lot No. (1) one, in block (187) one hundred and eighty-seven — otherwise its value."

4. Twelfth clause of will: "The remainder of my estate and effects I bequeath to be equally divided between my brother, Matthew Brady, and Margaret McGill, and George A. Brady, orphan child of John Brady, deceased."

5. That Bernard Brady did not, at the time he made his will or died, or ever, own, or claim to own, or have any interest in, lots 1 and 2 in block 187, or either of them, but did, at the time he made his will, and when he died, own lots 3 and 4 in the same block by an equitable title derived from Jasper W. Johnson, under an instrument in writing, dated October 4, 1862, executed and acknowledged by the said Johnson and his wife.

[Omitting immaterial facts.]

But it is further claimed that the devise is void on account of a false description of the lots intended to be devised, and that no parol evidence is admissible in aid of its construction. While it is conceded to be the general rule, that oral evidence is not admissible to explain or vary the words of a written instrument, there are so many exceptions and qualifications of the rule, that no case is tried where the force, operation, and construction of a written instrument are concerned, that oral evidence is not received in aid of its construction. The rule excluding oral proof in explanation of written instruments applies to the language of the instrument, and not to its import or construction. 1 Greenl. Ev., § 277. But the written instrument "may be read in the light of surrounding circumstances," in order to more perfectly understand its true meaning.

It is very common "to receive oral proof to show that language was used in a peculiar sense, or that one term was used for another; or that an essential term, to make the definition perfect, was wholly omitted or erroneously stated. These corrections are every day made by courts in fixing the construction of wills and other written instruments, by aid of extraneous evidence in regard to the state and

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condition of the subject-matter of the devise or of the devisee, in regard to one or the other."

Wills are frequently made during the last sickness of testators, and they too often depend wholly upon memory for description of their lands, and in consequence they are liable to great indefiniteness and occasional error. And on looking into the many cases decided, we find that courts have for a long period of years been compelled to deal with these descriptions in a very lenient manner, in order to reach the true intent of the testator "where that seemed practicable by the act of construction, and by the admission of oral evidence to remove latent ambiguities."

Mr. Redfield says: "One rule upon the subject is so thoroughly established as to have become a maxim in the law, *Falsa demonstratio non nocet*. The practical meaning of which is, that however many errors there may be in description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show with reasonable certainty what was intended. Redf. Am. Cas. on Wills, 544; *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. 144; *Jackson v. Sill*, 11 Johns. 201-218; 6 Am. Dec. 363; 1 Redf. on Wills, 580.

Then we apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2 in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be rejected. The devise is the same as if the numbers of the lots had not been mentioned at all or had been named and the numbers left blank. We are then compelled to fall back upon the remaining portion of the description, to wit: "A certain parcel of ground or lots in the city of Portland in block No. 187;" also "that lot or parcel of ground in the city of Portland in block 187." And by thus placing ourselves in the position of the testator, by oral evidence, at the time of the execution of his will, we find that there were two lots or parcels of ground in the city, of Portland, and in block 187, belonging to the testator at that time and also at the time of his death. This renders the devise entirely certain from

the language of the will as to the intention of the testator. The description would have been sufficient by merely naming the block and city in which the lots or land lay without specifying the numbers of them. The testator could not have intended to devise lots to which he never had any title, but must have intended to devise those which did belong to him. He had two just such lots or pieces of land as he names, and every way described as these are, with the single exception of this one false particular, and this is the very kind of case to which the maxim *falsa demonstratio non nocet* applies. *Allen v. Lyons*, 2 Wash. C. C. 475; *Winckley v. Kaime*, 32 N. H. 288; *Myers v. Riggs*, 20 Mo. 239; *Domestic and Foreign Missionary Society's Appeal*, 30 Penn. St. 425; *Button v. American Tract Society*, 23 Vt. 336. In *Winckley v. Kaime*, *supra*, the devise was of "thirty-six acres, more or less, of lot thirty-seven in the second division of Barnstead," and it appearing that there was no such lot in that division, but that the testator owned land in lot ninety-seven in that division, it was held to pass under the will. In *Allen v. Lyons*, *supra*, the devise was of a house and lot in Fourth street, Philadelphia. But it appeared on oral proof admitted by the court that the testator had no such property in Fourth street, but did own a house and lot in Third street, and it was held to pass under the devise.

While it is admitted that the court might go thus far in safety under the authorities, it is claimed that the devise cannot be sustained because it cannot be ascertained from the language of the will which lot the testator intended to give to Esther, and which to Margaret. To this we answer that it does appear that he intended to give each one a lot, and the evidence disclosing that there was no particular difference in the situation and relative value of the lots, it may be presumed that they took them in common; that each was to have an interest in both lots. And the sisters having amicably arranged between themselves as to which lot each one would take, we are unable to see which interest the appellant had in that matter.

[Omitting other considerations.]

Decree affirmed.

Gerrish v. Gerrish.

GERRISH V. GERRISH.

(8 Oreg. 351.)

Will — omission to name or provide for children of testator — reference to another will.

A statute provides that a testator, leaving a child or children not "named nor provided for" in his will, shall be deemed intestate as to such child or children. A testatrix left a will not in itself expressly naming nor providing for her children, but referring to and adopting provisions in her late husband's will, which named and provided for them. *Held*, that this was equivalent to naming and providing for them in her own will.*

A PPEAL from Yamhill county. Suit is a suit to quiet title. The opinion states the case. The plaintiffs had judgment below.

Shattuck & Killin, Thomas Tongue, R. Williams, and Fenton & McCain, for appellants.

Northup & Gilbert, for respondents.

PRIM, J. This is a suit in equity to quiet title to a certain parcel of land lately owned by Mary Ann Gerrish, deceased. The respondents claim as the devisees of said Mary Ann, and the appellants claim as her heirs at law. The appellants are the children and grandchildren of the deceased, and they claim that said will is void because they are neither named nor provided for therein; and that is the question to be decided on this appeal. The statute, page 788, section 10, provides that "if any person make his last will and die, leaving a child or children, in case of their death, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as shall regard such child or children, or their descendants, not named or provided for, shall be deemed to die intestate." * * * * It is admitted that the will itself makes no direct reference to the other children of the testatrix, but it is claimed that it refers to her husband's will, and adopts the provisions made in that for all of her children and descendants.

The clause in the will which refers to her husband's will is as

* Compare *Peters v. Siders* (126 Mass. 135), 30 Am. Rep. 671.

follows: "I direct that whatever may remain at my death of the personal property bequeathed to me by my late husband James Gerrish, for my life, shall at my death be distributed in accordance with the provisions made in the last will of my said husband concerning the same." This is the only clause in the will which refers in any manner to the appellants. The portion of the husband's will to which the above clause in the will of the testatrix refers, is as follows: "I give and bequeath to my beloved wife, Mary Ann, all the rest and residue of my real and personal property for her life-time; at her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughter alike, to be divided as a majority of them shall say, by sale or otherwise." This portion of the will of James Gerrish is clearly referred to in the will of the testatrix, and the provisions thereof adopted as a portion of her will. In *Tounele v. Hall*, 4 Comst. 140, it was held that "where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper, it seems, makes part of the will, although the paper be not subscribed or even attached."

In this case there can be no question as to the identity of the instrument referred to. The husband of the testatrix had been dead and his will admitted to probate several years before her will was written. In fact, she was then enjoying under the provisions of his will a life estate in several farms and a large amount of personal property. Then, considering the language of the will of James Gerrish, thus adopted and made a part of the will of the testatrix, we think there was a sufficient naming of the appellants to bring the case within the provisions of the statute.

Our statute is an exact copy of the Missouri statute, and the courts of that State having been called upon frequently to construe it, we must look principally to the decisions of that State to ascertain its proper judicial construction. In that State it is held that the statute does not require that an actual provision shall be made for the children, nor that the children shall be designated by name; that its object is not to compel parents to make testamentary provision for children, but to prevent the consequences of forgetfulness or oversight. In *Hockersmith v. Slusher*, 26 Mo. 237, Judge RICHARDSON says: "It may now be considered as settled that the object of this provision is to produce an intestacy only when

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the child or the descendants of such child is unknown or forgotten, and thus unintentionally omitted, and the presumption that the omission is unintentional may be rebutted when the tenor of the will, or any part of it, indicates that the child or grandchild was not forgotten." In that case a bequest had been made to a son-in-law, without naming his relation, and on the application of the daughter for a child's share, it was held that the bequest must have been given to her husband because he was such, and the daughter, though not named or provided for, could not have been forgotten. In *Guitar v. Gordon*, 17 Mo. 408, the testator named his daughter, who was then dead, but did not name her children, and that was held a sufficient provision for his grandchildren, as they were represented by their mother, who was in his mind, though dead. To the same effect is *Block v. Block*, 3 Ohio, 495; *Beck v. Metz*, 25 Mo. 70; *McCourtney v. Mathes*, 47 id. 533.

The decree of the court below is affirmed.

Decree affirmed.

SPRAGUE V. FLETCHER.

(8 Oreg. 367.)

Negotiable instruments — waiver of notice of protest.

A waiver of notice of protest does not waive demand of payment.

ACTION on a promissory note. The opinion states the facts. The defendant had judgment below.

Caples & Mulkey, for appellant. The indorsement on the note is an "express waiver," and an admission that the note has been presented or need not be presented. *Coddington v. Davis*, 3 Den. 16; 1 N. Y. 186; *Matthey v. Galley*, 4 Cal. 63; 5 East, 230; Chitty on Notes, 747; 19 Ind. 110; Edw. on Bills, 594; Story on Prom. Notes, 347; *Wall v. Bry*, 1 Louis, 312; *Scott v. Green*, 10 Barr. P. 103; Byles on Bills (Sharswood's ed.), top note; Story on Notes, 479, § 354.

E. C. Bradshaw and *Wm. Strong & Sons*, for respondents.

PRIM, J. This action was brought against Fletcher as an accommodation indorser on a promissory note. The complaint alleges that on the 2d day of August, 1875, one Jane Armstrong made and delivered to one T. Coyle her promissory note for \$411.87, payable with interest on one per cent a month in ninety days after date. That before the delivery of the note to Coyle, Fletcher, to secure the note and as an accommodation to Jane Armstrong, indorsed the note on the back thereof. That afterward, and before the note became due, Coyle transferred the same to Bradley, Marsh & Co. That S. L. Marsh, one of the members of the firm of Bradley, Marsh & Co., before the note was due, transferred the same to Levi Anderson. That afterward, and before said note became due, F. A. Fletcher indorsed on the back his waiver of demand and protest, as follows:

"I hereby waive notice of protest for non-payment.

(Signed)

"F. A. FLETCHER."

And that by reason of said indorsement of said note by F. A. Fletcher aforesaid, and his said waiver of notice of non-payment, he, the said F. A. Fletcher, became and now is, liable for the payment, etc. That the note belongs to the plaintiff and is wholly unpaid.

To this complaint, defendant Fletcher interposed a demurrer upon the ground that it does not state facts sufficient to constitute a cause of action. The court having sustained the demurrer, judgment was rendered against the plaintiff for costs, from which an appeal has been taken to this court.

The objection to the complaint is: That the respondent is sued as an indorser without any allegation of demand of payment being made upon the maker when the note became due; nor is there any excuse for the failure of such demand shown. On the other hand, it is claimed that demand and notice of non-payment were specially waived by an indorsement on the note before due in these words: "I hereby waive notice of protest for non-payment." Signed by the indorser. The question for determination is whether this operated as a waiver by the indorser of demand of payment, as well as a notice of such non-payment. We think it did not so operate. The general rule is that agreements of this character are to be construed strictly, and not extended beyond the fair import

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of the terms thereof. Story on Prom. Notes, § 272; *Berkshire Bank v. Jones*, 6 Mass. 524; *Central Bank v. Davis*, 19 Pick. 375; *Backus v. Shepard*, 11 Wend. 629.

In this case, the indorser does not say that he will waive demand of payment, but that he will "waive notice of protest for non-payment." Demand and notice are two distinct things, both of which are necessary to charge an indorser, and only one of them is waived by the indorser in this case. But it is claimed by appellant that the indorsement operated as a waiver of both, and the following decisions are cited to sustain the proposition. *Coddington v. Davis*, 3 Den. 16; *Matthey v. Galley*, 4 Cal. 63; *Gordon v. Montgomery*, 19 Ind. 110.

In *Coddington v. Davis*, the indorser wrote to the holder as follows: "You need not protest. T. B. C's note due, etc. I will waive the necessity of protest." This was held sufficient to dispense with a presentment and notice of non-payment, on the ground that the word "protest," as used by the indorser, in connection with the promissory note, was understood to mean the taking of such steps as were required by law to charge an indorser; that is, protest was understood to include both demand and notice. Although in a technical sense, the term protest means only a formal declaration drawn up and signed by the notary, yet as used by commercial men it includes all the steps necessary to charge an indorser. Burr. Law Dict. 349; *Townsend's Admr. v. Loraine Bank*, 2 Ohio St. 345. The case in 4 California is in point, but not a single case is cited in the opinion to sustain it. The case in 19 Indiana does not come up to this case. There the agreement was that "protest and notice of protest were waived," and were held sufficient to include waiver of demand.

Thus it will be seen that none of the cases cited sustain the proposition of appellant except the California case, while there are numerous decisions holding the contrary doctrine. 6 Mass. 524; *Freeman v. O'Brien*, 38 Iowa, 406; *Scott v. Green*, 10 Penn. St. 103.

The judgment of the court below is affirmed, and case remanded to the court below for further proceedings.

Judgment affirmed.

STATE V. DUCKER.

(8 Oreg. 394.)

Criminal law — larceny — retaining money paid by mistake.

The prosecutor delivered to the defendant a roll containing ten twenty-dollar gold pieces, supposing it to contain only ten silver dollar pieces. The defendant, although when he discovered the mistake he had reason to know the money belonged to the prosecutor, on demand refused to make restitution. *Held*, larceny. (See note, p. 591.)

CONVICTION of larceny. The defendant asked Bracker to change a ten-dollar gold piece for him. Bracker did so, but by mistake gave him a roll of ten twenty-dollar gold pieces instead of ten dollars in silver. This money the defendant converted to his own use, and refused to make restitution, although when he discovered the mistake he had reason to know that it belonged to Bracker.

Ball & Gregory, for appellant.

J. F. Caples, district attorney, and *M. F. Mulkey*, for the State.

PRIM, J. The indictment charges the appellant with the larceny of ten twenty-dollar gold pieces. At the trial the court, among other things, charged the jury that "if the prosecuting witness delivered to the defendant ten twenty-dollar gold pieces under the belief that he was giving him that number of silver pieces, and the defendant so took them sharing the mistake, and if, upon discovering the mistake, the defendant knew or had the means of knowing who the owner of the gold pieces was, but he thereupon, nevertheless, converted them to his own use, it was larceny." This instruction is objected to on behalf of the appellant and assigned as error.

This objection, we think, is not well taken, as the instruction contains a correct statement of the case upon the point developed by the evidence in this case. The money in excess of that which the appellant was entitled to receive was taken without the owner's consent, and that which was thus taken was appropriated to the appellant's use with an intent to cheat and fraudulently to deprive the owner thereof.

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These two elements, being both present in this case, are sufficient to constitute the crime of larceny, for it will not do to say that the owner parted with his money voluntarily, and therefore there could not have been any unlawful taking. While it may be said that it was the physical act of the owner in handing that which was his to another, yet there was lacking his intellectual and intelligent assent to the transfer, upon which the consent necessarily depended. And so in the case "where money or property is obtained from the owner by another upon some false pretense, for a temporary use only, with the intent to feloniously appropriate it permanently, the taking thereof, though with the owner's consent, is larceny." *Wolfstein v. People*, 13 N. Y. Supreme Ct. 121; *People v. McGarren*, 17 Wend. 460; *People v. Crall*, 1 Den. 120.

There being no substantial error in the record, the judgment of the court below is affirmed.

[Omitting a minor point.]

Judgment affirmed.

NOTE BY THE REPORTER.—See *State v. Anderson*, 25 Minn. 66; s. c., 33 Am. Rep. 455. The case of *People v. Call*, 1 Den. 120, was where the prisoner, the maker of a promissory note, received it from the owner to indorse on it a partial payment which he had made, and refused to return it. This was held larceny, the legal possession not being changed, and the prisoner receiving the note as the servant or agent of the owner. It was not essential, therefore, that there should be a felonious intent at the moment of receiving the note.

In *People v. McGarrin*, 17 Wend. 460, the prosecutor unintentionally left his whip in the defendant's shop, and the defendant found and concealed it, and denied that it was there. The jury finding a felonious intent, *held*, larceny.

All the foregoing differ from the principal case in that the prosecutor in none of them intended to part with the property, while in the principal case, he intended to part with the property to what he supposed he had delivered.

Wolfstein v. People, 6 Hun, 121, is more nearly like the principal case. The prisoner presented a draft, written in the French language, to a bank for payment. The teller was unable to read French, and also mistook the figures \$74 for \$742, and paid the prisoner that sum. The prisoner, knowing that he was only entitled to \$74, kept the money, concealed and denied the overpayment, and appropriated it to his own use. This case, it will be seen, differs from the principal case in one particular; in this case the mistake was evident at the instant of payment, but in the principal case it was concealed by the fact that the money was in a roll. In this case the court said: "The case then presents this question: If a party who receives from another, money to which he knows he is not entitled, and which he knows has been paid to him by mistake, should conceal such overpayment and appropriate the money to his own use, intending thus to cheat, and defraud the owner thereof, would he or not be guilty of larceny? If it be answered that he would not, can the element needed to make it such, and which is absent, be pointed out? The money, in excess of that which he is entitled to receive, is taken without the owner's consent, and that which is thus taken is appropriated to the taker's use with intent, fraudulently, to deprive the owner thereof. These two elements make the crime of theft, and they are both present here.

"It will not do to say that the owner parts with the property voluntarily, and therefore there is no unlawful taking. There may be the physical act of the owner handing that which is his to another, but there is absent the intellectual and intelligent assent to the transfer, upon which the consent must necessarily depend. Where money or property is

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obtained from the owner by another upon some false pretense, for a temporary use only, with the intent feloniously to appropriate it permanently, the taking, though with the owner's consent, is larceny. Wherein do the cases differ? In both there is a physical delivery by the owner, and in both the taker knows that it was given for no such purpose as he has in mind, and yet he, unlawfully and wickedly, in both cases, seeks to deprive the owner thereof. If the one case is larceny, the other is also.

"So, too, the finder of property, if he knows the owner and conceals such finding, and appropriates it to his own use, with intent to deprive the owner thereof, is guilty of larceny. So in this case, if the prisoner found, on counting the money, that in his possession to which he knew he was not entitled, and which he also knew the owner did not intend to deliver to him, he was bound to deliver it to the owner, and if he did not, but concealed its possession, and sought to deprive the owner thereof, the crime was complete.

"From the evidence in this case, and the verdict rendered, we are bound to assume that mistake was noticed and discovered by the prisoner at some time. If the overpayment was observed in the bank when the money was delivered, and the prisoner took it with the intent to cheat and defraud the owner, the crime was then complete. If, however, the error was not then noticed, but was afterward, and the intent of felonious appropriation was then formed and executed, the legal guilt of the prisoner was at that time incurred. As in the case of the finder of the lost article, the original taking may be lawful, but legal accountability as for crime begins when the owner is discovered and the intent formed unlawfully and feloniously to deprive him of the possession thereof."

LICHTENSTEIN V. MELLIS.

(8 Oreg. 464.)

Trade-mark — sign — infringement.

The sign "Great IXL Auction Co." is not an infringement of the sign, recorded as a trade-mark, "IXL General Merchandise Auction Store." (*See note, p. 593.*)

ACTION for violation of plaintiff's trade-mark. The complaint alleges, that the plaintiffs have the exclusive right to use as a trade-mark the name "IXL General Merchandise Auction Store," and that the respondents, fraudulently, and for the purpose of deceiving the public, use the name "Great IXL Auction Company." The defendant had judgment below.

O. P. Mason and E. T. Howes, for appellant.

Johnson, McCown & Macrum, for respondents.

BOISE, J. It is conceded that the first ground of demurrer, to wit, that the court has not jurisdiction of the case, is not tenable; and the appellants now rely on the second ground of demurrer, to wit, that the complaint does not state facts sufficient to constitute

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a cause of action. In determining this cause of demurrer, we will first consider the matter as to whether or not the letters and words "IXL General Merchandise Auction Store," which constitute the trade-mark of the plaintiff, are so nearly identical with or similar to the words and letters used by defendants, to wit, "Great IXL Auction Co.," as to be likely to mislead the public, and cause the one to be taken for the other, and thereby draw the customers of the appellant to the store of the respondents, and thereby injure the business of the appellant. We do not think the letters and words used by the parties are so nearly identical in appearance or meaning as to mislead the public. The words used by the appellant, "General Merchandise Auction Store," suggest that the store contains a general assortment of merchandise, and that goods are there sold at auction. The words "Great Auction Co." would suggest that the Co. sold goods and other property, such as lands and such other things as are embraced under the head of general merchandise. All the words are different in these respective signs except the word auction, and this is a word that is generally used over all places where auctions are conducted, and cannot be appropriated by any one as a trade-mark without being used with other words.

It is claimed that the letters "IXL" could not be used by the respondent after being appropriated by the appellant. These letters have been used by many manufacturers to denote their wares, as on cutlery and on bitters, and were not the invention of the plaintiffs, but taken by them from former proprietors and inventors thereof, and do not by themselves make a trade-mark any more than the word Excelsior, which is often used with other words to make a trade-mark or sign. And in this case, the appellants have recorded all the words above with these letters as their trade-mark, and cannot now claim these letters alone constitute it. We think the signs of the parties are not sufficiently similar to warrant the court in interfering to restrain the respondents, or to entitle the appellant to damage.

The judgment of the Circuit Court will be affirmed, with costs.

Judgment affirmed.

NOTE BY THE REPORTER. — The latest and most authoritative decision on the subject of trade-mark right in letters of the alphabet is *Amoskeag Manufacturing Co., Appellant, v. Trainer*, United States Supreme Ct., October Term, 1879, where it was held as follows:

The manufacturer of goods has no right to the exclusive use as a trade-mark of any words, letters, figures or symbols which have no relation to the origin or ownership of the

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goods, but are only meant to indicate their names or quality. And letters or figures which by the custom of traders or the declaration of the manufacturer of the goods to which they are attached are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one like the adjectives of the language. Accordingly where a manufacturer of cloth adopted as a mark to distinguish the best quality of its goods manufactured the letters "A. C. A.," and to denote inferior qualities the letters "B." and "C." and "D." *Held*, that it could not claim the exclusive right to use the letters "A. C. A." as a trade mark. The court said, FIELD, J.:

"This is a suit in equity to restrain the defendants from using on ticking manufactured and sold by them the letters A. C. A., in the sequence here named, alleged by the complainant to be its trade-mark, by which it designates ticking of a particular quality of its own manufacture; and to compel the defendants to account for the profits made by them on sales of ticking thus marked.

"It appears that the complainant, a corporation created under the laws of New Hampshire, commenced the manufacture of ticking at Amoskeag Falls, in that State, some time prior to 1834, and marked its products with a label or ticket consisting of a certain device within which were printed, in red colors, the name of the company, its place of manufacture, the words 'Power Loom,' and in the center the single letter 'A' or 'B' or 'C' or 'D,' according to the grade of excellence of the goods, the first quality being indicated by the first letter and the decreasing quality from that grade by subsequent letters in the alphabet. The device, apart from the words mentioned, was a fancy border of red colors, square outside and elliptical within, and the words in the upper and lower lines of the label were printed in a line corresponding with the inside curve of the border.

"In the year 1834, or about that time, the company introduced an improvement in its manufacture, by which it produced a grade or quality of ticking superior to any which it had previously manufactured. For goods of this quality it used in its label or ticket, in place of the single letter A, the three letters A. C. A. The original device, with its colored border and printed words, indicating the company by which and the place where the goods were manufactured, was retained, the only alteration consisting in the substitution of the three letters A. C. A. in place of the single letter A. Subsequently the company changed its place of manufacture from Amoskeag Falls to Manchester, in the same State, and a corresponding change was then made in the label. The three letters mentioned were placed in the label or ticket on all goods of the very highest quality manufactured by the complainant, the single letter being retained in the labels placed on other goods to indicate a lower grade or quality. The combination of the three letters was probably suggested, as is stated, by the initials of the words in the company's name — Amoskeag Company — with the letter A previously used, to denote the best quality of goods it manufactured. It is contended by the complainant that the combination was adopted and used to indicate, not merely the quality of the goods, but also their origin as of the manufacture of the Amoskeag Company. It is upon the correctness of this position that it chiefly relies for a reversal of the decree dismissing the bill.

"On the part of the defendants the contention is that the letters were designed and are used to indicate the quality of the goods manufactured and not their origin; that it was so adjudged many years ago in a case to which the company was a party in the Superior Court of the city of New York, which adjudication has been generally accepted as correct and acted upon by manufacturers of similar goods throughout the country; and that the letters, as used by the defendants on a label or ticket having their own device, and in connection with words different from those used by the complainant, do not mislead or tend to mislead any one as to the origin of the goods upon which they are placed.

"The general doctrines of the law as to trade-marks, the symbols or signs which may be used to designate products of a particular manufacture, and the protection which the courts will afford to those who originally appropriated them, are not controverted. Every one is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. In this way it often

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proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the courts will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation or by restraining others from applying it to their goods and compelling them to account for profits made on a sale of goods marked with it.

"The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose either to the manufacturer or to the public; it would afford no protection to either against the sale of a spurious in place of the genuine article. This object of the trade-mark and the consequent limitations upon its use are stated with great clearness in the case of *Canal Company v. Clark*, reported in 13th Wallace. There the court said, speaking through Mr. Justice STRONG, that 'no one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection.' And a citation is made from the opinion of the Superior Court in the city of New York in the case of the present complainant against Spear, reported in the 2d of Sandford, that 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth and therefore have an equal right to employ for the same purpose.'

"Many adjudications, both in England and in this country, might be cited in illustration of the doctrine here stated. For the purpose of this case, and in support of the position that a right to the exclusive use of words, letters or symbols to indicate merely the quality of the goods to which they are affixed cannot be acquired, it will be sufficient to refer, in addition to the decisions mentioned in Wallace and Sandford, to the judgment of the vice-chancellor in *Raggett v. Findlater*, where an injunction to restrain the use by the defendants upon their trade label of the term 'nourishing stout,' which the plaintiff had previously used, was refused on the ground that 'nourishing' was a mere English word denoting quality. L. R., 17 Eq. 29. Upon the same principle letters or figures which by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one, like the adjectives of the language.

"If, now, we apply the views thus expressed to the case at bar, we shall find the question involved to be of easy solution. It is clear from the history of the adoption of the letters A. C. A., as narrated by the complaint, and the device within which they are used, that they were only designed to represent the highest quality of ticking which is manufactured by the complainant, and not its origin. The device previously and subsequently used stated the name of the manufacturer, and no purpose could have been subserved by any further declaration of that fact. And besides, the letters themselves do not suggest any thing and require explanation before any meaning can be attached to them. That explanation when made is that they are placed in the device of the company when it is affixed to the finest quality of its goods, while single letters are used in the same device when it is attached to goods of an inferior quality. They are never used by themselves, but merely as part of a device, containing, in addition to the border in red, several printed terms. Alone the letters convey no meaning; they are only significant as part of the general device constituting the trade-mark. Used in that device to denote only quality, and so understood, they can be used by others for a similar purpose equally with the words 'superior' or 'superfine,' or other words or letters or figures having a like signification.

"We are aware that there is in this record the testimony of several witnesses to the effect that they understood that the letters were intended to indicate the origin as well as

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the quality of the goods to which they were attached, but it is entirely overborne by the patent fact that the label previously disclosed the name in full of the manufacturer and by the history of the adoption of the letters, as narrated by the complainant. As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the company. And if they do not read the name as printed, the letters are unintelligible. If an explanation be asked of their purpose in the label, the only reasonable answer which can be given is the one which corresponds with the fact that they are designed merely to indicate the quality of the goods.

"But there is another and equally conclusive answer to the suit. The label used by the defendants is not calculated to mislead purchasers as to the origin of the goods to which it is attached. It does not resemble the device of the complainant. Its border has a different figure; it is square outside and inside. It has within it the words 'Omega' and 'Ring Twist,' as well as the letters 'A. C. A.' Neither the name of the complainant, nor of the place where its goods are manufactured, nor the words 'Power Loom,' are upon it. The two labels are so unlike in every particular, except in having the letters A. C. A. in their center, that it is impossible that any one can be misled in supposing the goods, to which the label of the defendants is attached, are those manufactured by the complainant. The whole structure of the case thus falls to the ground. There is no such imposition practiced upon the public and no such fraud perpetrated upon the manufacturers in attempting to dispose of the goods of one as those of another, as to call for the interposition of a court of equity.

"The decree of the court is therefore affirmed."

CLIFFORD, J., dissented.

In *Lawrence Hosiery Manuf. Co. v. Lowell Hosiery Mills*, Massachusetts Supreme Court, Sept., 1880, the plaintiff used as a trade-mark for many years upon hosiery the figure of an eagle surmounting a wreath formed of the branches of the cotton plant. The wreath inclosed the words "Lawrence Manufacturing Company," printed in a circle, having underneath it the word "trade-mark," and, below all, the figures "523," printed in large hollow block numerals. Before this the plaintiff had used an eagle and scroll in combination with other numerals as a trade-mark upon the same grade of hosiery. Defendant stamped hosiery made by it with a device consisting of an eagle surmounting a double circle or garter, on which were printed the words "extra finish iron frame," and beneath the figures "523," printed in large hollow block numerals of the size and description used by the plaintiff and occupying the same position with reference to other parts of the device. *Held*, under a statute protecting a person who uses any peculiar name, letters, marks, device or figures upon an article manufactured or sold by him, to designate it as an article manufactured by him, that defendant's stamp was a violation of plaintiff's trade-mark entitling plaintiff to protection.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

ST. JOSEPH CHURCH V. ASSESSORS OF TAXES.

(12 R. I. 19.)

Taxation — exemption — “building for religious worship.”

The residence of a priest or clergyman is not exempt from taxation as a “building for religious worship,” because it contains one room set apart as a religious chapel.

PETITION for relief against over-assessment. The opinion states the case.

Charles E. Gorman, for petitioner.

Nicholas Van Slyck, city solicitor of the city of Providence, *contra*.

DURFEE, C. J. [Omitting a question.] 2. The assessment is complained of because it covers lands and buildings which the petitioners claim are exempt from taxation under the clause of chapter 533 above recited, as being used exclusively for religious worship. The building in question is the parsonage or residence of the priest or clergyman of the church. It is a dwelling-house.

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It contains a room which is used as a chapel in the celebration of certain services and sacraments of the Roman Catholic Church, and for that reason, it is contended that it is entitled to exemption as a building for religious worship. But we do not see how an entire house becomes a building used exclusively for religious worship merely because one room in it is used for religious worship, when all the other rooms are devoted to personal or domestic uses. At the utmost, exemption could be claimed, on that account, only for the room which is used as a chapel. Neither do we think the building is, under the statute, "a building for religious worship," because it is occupied by a priest or ecclesiastic, who is peculiarly consecrated by his own vows and by the discipline and canons of his church to religious offices. Even such a person has secular necessities to which his dwelling-house is subservient. And, see *Gerke v. Purcell*, 25 Ohio St. 229, 248.

The petition must be dismissed and judgment entered for the respondents for costs.

Petition dismissed.

WAKEFIELD V. NEWELL

(12 R. I. 73.)

Municipal corporation — negligence — surface water.

A municipal corporation is not liable for allowing ordinary surface water to escape from a highway on to adjacent land, nor for the results of such ordinary changes of grade as must be presumed to have been contemplated and paid for laying out the highway.*

TRESPASS on the case. The opinion states the case.

Beach & Osfield and Stephen A. Cooke, Jr., for plaintiff.

Pardon E. Tillinghast, for defendant.

DURFEE, C. J. This is an action of the case to recover damages from the town of Pawtucket, for suffering water to flow from

*See *Lynch v. Mayor* (76 N. Y. 60), 32 Am. Rep. 271, and note, 274; *O'Brien v. City of St. Paul* (25 Minn. 248), 33 Am. Rep. 470.

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a highway in the town upon adjoining land belonging to the plaintiff. The declaration sets forth :

“The plaintiff was and still is the owner in his own right of certain real estate situate in said town, on and adjoining a certain street and public highway in said town, called Pleasant street, and which street said town was bound to keep in good and suitable repair, for travelling in and upon the same, and to keep certain gutters and sluiceways running in and along said highway, so and in such good repair that the water that usually and of right should run therein should not overflow and run out and upon the said land of the said plaintiff ; but the said town, by themselves, their officers, agents, and employees, so negligently and wrongfully kept the said street and public highway, and the sluiceways thereof in such bad repair, that the water which they ought and should have carried in and along said street overflowed on and over the land of the plaintiff, so that the said land was by said water overflowing thereon greatly damaged, and the crops growing thereon were greatly injured,” etc.

The defendant demurs to the declaration upon the ground that it does not properly set forth any cause of action. The plaintiff relies in support of the action upon *Inman v. Tripp*, 11 R. I. 520 ; s. c., 23 Am. Rep. 520. In that case the plaintiff owned an estate in the city of Providence, on Public street, at the lowest point thereof, and the city so changed the grade of several streets as to allow surface water which formerly flowed in other streets, and surface water which was formerly ponded in another street at some distance from the plaintiff's estate, to run down Public street, and thence on to his estate and into his cellar and well, and the court held that the plaintiff was entitled to an action against the city for the injury. The declaration in the case at bar does not show any such case. It merely shows that water escaping from the highway upon the plaintiff's land injured it, and the crops growing upon it. It is true the declaration alleges that the water ought to have been kept or carried by the town in the gutters or sluiceways of the street. The question of duty, however, is a question of law, and the defendant is entitled to have the facts alleged on which the duty is predicated. For any thing that appears, the injury to the plaintiff was the result of the ordinary and natural flow of the surface water, which the defendant would be under no obligation to confine in gutters or sluiceways for the plaintiff's protection, or of

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such changes near at hand as are usually made, and must therefore be presumed to have been contemplated, and paid for in the layout. *Flagg v. City of Worcester*, 13 Gray, 601. In *Inman v. Tripp*, 11 R. I. 520 ; s. c., 23 Am. Rep. 520, we did not mean to decide that a town or city has any less power over its streets or highways, in respect of surface water, than an individual has over his own land, but only that it has no greater power ; or in other words, that it is liable for discharging the surface water accumulating in its streets and highways, to the same or very much the same extent, as an individual is liable for discharging such water from his own land upon his neighbor's. If this action were against an individual instead of a town, we do not think a declaration, similar in form would be sufficient ; for mere neglect by an individual to retain on his own land water which, falling there, would naturally flow on to his neighbor's land, is no cause of action, unless he first accumulates it by artificial means so as considerably to increase the volume and detrimental effect with which it would flow on his neighbor's land. *Pettigrew v. Evansville*, 25 Wis. 223, 229 ; *Livingston v. McDonald*, 21 Iowa, 160 ; *Gannon v. Hargadorn*, 10 Allen, 106 ; *Butler v. Peck*, 16 Ohio St. 334 ; *Goodale v. Tuttle*, 29 N. Y. 459, 467 ; Washburn on Easements, 450 *et seq.*

We think therefore, that as the declaration now stands, the demurrer must be sustained.

Demurrer sustained.

ELLIOTT V. GOWER.

(12 R. I. 79.)

Marriage — married women's charge of separate property.

A married woman may charge her separate equitable estate expressly in writing, or orally when the contract is for the benefit of herself or the estate.*

BILL to charge a married woman's trust estate. The opinion states the case.

Tillinghast & Ely, for complainant.

George Lewis Gower, for respondents.

* See *Smith v. Thompson* (2 McArthur, 291), 29 Am. Rep. 261 ; *Wilson v. Herbert* (12 Vroom, 454), 32 Am. Rep. 243.

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POTTER, J. Certain property was conveyed to trustees, who after paying certain debts and expenses were to pay over to Mrs. Gower, then Mrs. Perry, the rents and income of the property as they accrued, or to pay them to her order on her sole and separate receipt. The trustees were also empowered in their discretion to apply to her use a portion of the principal. On her decease the trust was to end, and the property remaining to be conveyed as she should by will direct, and in default thereof to her heirs at law. The instrument of conveyance contained the clause, "intending to give to said trustees absolute and complete control over said property, subject, however, to the trusts and conditions herein named."

The bill alleges that May 3, 1871, Mrs. Perry being indebted to the plaintiff in the sum of \$780.25, for goods received by her, and work and labor done for her, and at her request, gave the complainant an order in writing on the respondent, the R. I. Hospital Trust Company, for that amount, which was presented, and payment demanded and refused, although, as alleged, the said Trust Company had received more than enough of said income to pay it. And the bill further alleges that between May and June, 1871, Mrs. Perry became further indebted to the complainant for goods purchased and received by her in the sum of \$505.75, and promised the complainant to pay him the same out of said trust estate and the income thereof, and that the said respondent Trust Company had notice thereof. This promise is not alleged to be in writing. Both sums remain unpaid.

The bill prays that said sums may be decreed to be a charge and lien on said trust estate and the income thereof, and that payment of the same may be ordered from the trust estate.

The bill is demurred to, and we are to decide whether on the facts as stated, if proved, the complainant would be entitled to relief.

Unless there is something in the instrument creating the trust to prevent it, a married woman may, by her own acts, charge her separate equitable estate, and this is the more reasonable as she might convey it entirely, whether real or personal, unless restrained by the terms of the trust. See Snell on Equity, 298, and cases there cited; *Stead v. Nelson*, 2 Beav. 245; *Major v. Lansley*, 2 Russ. & M. 355; *Pride v. Bubb*, L. R., 7 Ch. App. 64; *Hodgson v. Hodgson*, 2 Keen, 704; *Dowling v. Maguire*, Llo. & G., temp.

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Plunket, 1; *Murray v. Barlee*, 3 Myl. & K. 209; *Owens v. Dickenson*, 1 Cr. & Ph. 48; *Acton v. White*, 1 Sim. & Stu. 429.

And it seems to be the result of the cases, so far as we can consider the law established, that if she declares her intention to charge her separate estate expressly and in writing, or if she does verbally and the contract is for her own benefit or for the benefit of her separate estate, so that the court can infer the intention, the charge will be good.

The history and limitations of the doctrine are fully discussed and stated by Lord ROMILLY, in *Shattock v. Shattock*, L. R., 2 Eq. 182. See, also, *Yale v. Dederer*, 22 N. Y. 450; *Methodist Epis. Church v. Jaques*, 3 Johns. Ch. 77; *Jaques v. Methodist Epis. Church*, 17 Johns. 548; 8 Am. Dec. 447; Snell on Eq. 303-305.

Some of the cases have gone much farther than the rule we have stated, and in some of our States the doctrine has been extended to the statutory legal estate. See *Yale v. Dederer*, 22 N. Y. 450, and the cases cited in *Johnson v. Gallagher*, 3 De G., F. & J. 494; *Vaughan v. Vanderstegen*, 2 Drew. 165, 182; *Nash v. Mitchell*, 3 Abb. New Cas. 171.

There seems good sense in the distinction we have stated between written and verbal engagements. The former are more likely to be entered into deliberately and lawfully, while verbal conversations may be more hasty and vague, and more likely to be misunderstood by one party or the other. See opinion of KINDERSLEY, V. C., in *Matthewman's case*, L. R., 3 Eq. 781, 786.

We assent to the position of the counsel for the respondents that a court of equity should most thoroughly scrutinize the evidence in such cases.

While holding, as we have stated, as to the general power to charge the separate estate, we express no opinion as to the extent of the power in the present case, and whether it extends to more than the income, that point not having been argued by counsel.

Demurrer overruled.

KING PHILIP MILLS V. SLATER.

(12 R. I. 82.)

Contract — sale — successive deliveries.

The plaintiff having failed in the first deliveries of goods which he contracted to manufacture and deliver, in successive lots, cannot compel the acceptance of goods subsequently manufactured and offered.

ASSUMPSIT. The opinion states the case.

Benj. F. Thurston & John D. Thurston, for plaintiff.

A. & A. D. Payne and *John F. Tobey*, for defendants.

POTTER, J. The declaration charges that the defendants on the 28th January, 1873, in consideration of the promise of the plaintiffs to sell to the defendants a certain quantity of jaconets, viz.: each lot which they should produce from 400 looms before July 1 (describing the quality, etc.), each lot to be of 1,000 pieces, undertook and promised to pay therefor cash $7\frac{1}{2}$ cents per yard, thirty days from the delivery of each lot, and the plaintiffs aver that they proceeded to employ said 400 looms, etc., and on the 19th day of May were ready and willing, and offered to deliver 1,000 pieces, etc., conforming to agreement, which defendants refused to accept; and the plaintiffs make similar averments as to subsequent lots of 1,000 pieces each for May 21, 27, June 3, 5, 11, 14, 19, 21, 26, 30, and July 3, being the products of said 400 looms between the dates, and alleging damages; and in another count defendants aver that on the — day of —, A. D. 1873, the defendants gave notice to plaintiffs that they should thereafter refuse to accept said goods, etc., etc.

The contract in this case was, after some introductory verbal negotiations, concluded by letter. On January 28, 1873, Mr. Chace, a director of the plaintiff company, wrote to Samuel Slater & Sons that he was instructed by the treasurer to accept the offer of $7\frac{1}{2}$ cents thirty days from the delivery of each lot of jaconets the plaintiffs should produce on 400 looms before July 1, of specified width, weight, etc. The mill was expected to be in full operation

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by April 1, but they would begin to deliver sooner if they could, and they expected to do so.

The same day Samuel Slater & Sons replied to Mr. Chace, recapitulated the above, and said, "it is also understood that the maximum production is to be reached as soon as possible, and steadily maintained, unavoidable interruptions only excepted, until the completion of the contract ; * * * and to be delivered in Providence in lots of 1,000 pieces each ;" and they request a confirmation of the sale from the treasurer. January 31, the treasurer acknowledged the receipt of a copy of Chace's letter, and of the letter of Samuel Slater & Sons, and ratifying "the above described contract," stated, "we will commence to deliver the goods as soon as we possibly can, and will reach the maximum production as soon as possible."

The price agreed on was to be paid in thirty days after the delivery of each lot.

It appears in evidence that two lots of goods of about the specified quantity of 1,000 pieces were sent to defendants on or before April 17, which, it is not disputed, were deficient in width and other particulars; that April 17, the defendants telegraphed to the plaintiffs that the goods were deficient in width and weight, and to send no more until right; that April 18 they wrote to plaintiffs to the same effect, that they needed an immediate supply, and inquiring "what are we to expect;" that April 19 the plaintiffs wrote that they would get new reeds, that they had measured the width with a tape, etc., etc.

And April 21 the defendants wrote to the plaintiffs that as they must have an immediate supply or stop their mill, the contract was terminated. The defendant's agent testified that as soon as they found that the plaintiffs had such reeds and no others, they gave this notice to terminate the contract.

It is not disputed that the goods were to be delivered in lots of 1,000 pieces each; but it is contended by the plaintiffs' counsel that it would have been a compliance with the contract if all had been delivered in June. This is not the construction which would strike the mind of an ordinary intelligent business man as being the proper one, and we do not think it is the correct view. We think it is plain that the deliveries were to be made as the goods were manufactured. By the letters, the plaintiffs were to begin to deliver as soon as possible, theirs being a new mill, and were to reach the

maximum production of the 400 looms as soon as possible. The defendants were engaged in finishing this sort of goods for the market, and bought these goods to supply their mills for that purpose; and two witnesses say that it was not a common style of goods, and there were but few in market. Both parties were manufacturers and in a manufacturing community, and might well be supposed to know something of each other's business and wants.

We think the reasonable construction of the letters is that the defendants were to have the whole production of 400 looms, deliveries to commence as soon as possible, and to be continued in lots of 1,000 each as fast as produced.

The question then arises, Were the defendants justified in rescinding the contract? We think they were. The first two lots were, without dispute, not according to the contract. The width was material. The plaintiffs had made the mistake as to the width from measuring it with a tape. They were also using a kind of reeds unsuitable for the manufacture, and there could be no reliance on the future product.

The plaintiffs having failed in the first deliveries, the defendants were not bound to take the goods offered during the latter part of the period. To hold that where successive deliveries of goods of certain qualities and quantities are to be made at successive periods, the purchaser, while he may reject those not of the quality, is bound to take those which are of the agreed quality to the end of the time, would introduce an element of uncertainty into such matters highly injurious to the interests of a business community. The purchaser may, indeed, choose not to rescind, and to accept them; and so he may accept even those not of the quality; and if so he must pay for them what they are worth. And the case would be very different, if in a contract to be paid for in one sum at the last delivery the seller, having complied with all the previous deliveries, failed in some of the latter ones. In such a case the purchaser would have received a benefit from the contract, and it would be right that he should pay for the benefit received.

It is to be observed here, that the plaintiffs do not allege in their declaration that they began to deliver the jaconets as soon as possible, nor that the maximum production was reached as soon as possible; nor do they definitely allege that the whole product of 400 looms was at any one time ever sent to the defendant. And there is no positive evidence that the whole number of 400 looms

was ever put upon this contract. And passing over entirely the first two deliveries of imperfect goods, they proceed to allege a readiness to deliver under the contract on the 19th of May, and so on.

They do not allege a performance on their part of the agreement they prove.

The purchasers were not bound to take any goods not according to the contract, as the two first lots of jaconets were; and the only question is, When, after failure on the part of the vendors, have the purchasers a right to rescind and look elsewhere for their supplies? In this respect each case must depend on its own circumstances. To hold that the purchaser must receive such lots as are of the right quality, and that for the periods when they are not so he must supply himself elsewhere, and sue for his damages, or claim to deduct them, would introduce confusion into business. It would in most cases entirely frustrate the object of the contract.

As the arguments on both sides have been very able and ingenious, both on principle and authority, it may be well to consider some of the cases to which our attention has been invited.

The most important points in the decision of such cases are: *first*, Whether the covenants or agreements are independent, *i. e.* where one can sue the other without performance of his own part of the bargain; or dependent, *i. e.* where one party cannot sue unless he has performed, or has offered, or is willing to perform his own part of it; and *second*, whether the time is material, or as sometimes expressed, whether time is of the essence of the contract.

The plaintiffs contend, as we understand them, from the statements of their counsel and from the cases they cite, that time was not essential in the present contract; and that the agreements on each side were so far independent that the plaintiffs can maintain their suit, and leave the defendants to their cross action for any damages they, the defendants, have suffered from the plaintiffs' failure to fully perform.

Several of the cases relied on by the plaintiffs go back to and cite *Pordage v. Cole*, 20 & 21 Charles II, A. D. 1669; 1 Saund. 319 *i*, case 54, as authority. In that case plaintiff had agreed to sell land, and the defendant had agreed to pay the plaintiff £775 for his land at a time appointed. The plaintiff did not allege that he had ever conveyed or offered to convey the land, but sued the defendant for the money.

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To persons of ordinary intelligence it would seem that although the money was to be paid at a particular time, yet as it was stated and admitted that it was for the land, the purchaser should not be required to pay until he got the land; unless, which does not appear, the parties, when making the contract, knew it could not be conveyed by that time. Then the defendant would have contracted with his eyes open.

But the learned court held that the plaintiff should have his judgment for the money, and the defendant should be left to sue for his damages for not conveying the land.

In some cases of this sort justice might be done under the law and practice of set-off, by letting both parties sue and retaining the cases until both could be decided. But this would be a very round-about way of doing justice.

The court seems in this case to have been influenced by the fact that the agreement was under seal. But justice requires that the intentions of the parties should control as much in that case as in any other case of contract.

When in *Goodisson v. Nunn*, 4 T. R. 761, A. D. 1792, in an action on a contract similar to the foregoing, except that a time was expressed for making the deed, *Pordage v. Cole*, with 1 Rol. Abr. 415, pl. 8, and *Blackwell v. Nash*, 1 Str. 535, were cited for the plaintiff, Lord KENYON, C. J. in giving his decision, said that the determinations in those cases outraged common sense. He considered the old cases overruled by the decision of Lord MANSFIELD in *Kingston v. Preston*, as given in *Jones v. Barkley*, Doug. 689. And BULLER, J., said if there had been no case in opposition to those old ones, he should not hesitate to make a precedent. And GROSE, J., considered the later decisions as the most sensible.

So in *Glazebrook v. Woodrow*, 8 T. R. 366, 371, GROSE, J., criticises the tendency of the old cases to construe the covenants to be independent as "contrary to the real sense of the parties and the true justice of the case. See, also, the remarks of LAWRENCE, J.

And the tendency of modern decisions is to introduce more equitable rules, to endeavor to carry out the intention of the parties, and to construe the agreements as dependent when possible. See Lord MANSFIELD's rules in *Kingston v. Preston*, Doug. 689; Evans' *Decisions of Lord Mansfield*, 1; *Ritchie v. Atkinson*, 10 East, 295, 310. And see *Bank of Columbia v. Hagner*, in the U. S. Supreme Court, 1 Pet. 455, 465.

The case of *Hoare v. Rennie*, came before the English Court of Exchequer, A. D. 1859, 5 H. & N. 19. The defendants agreed to buy of the plaintiffs 667 tons of iron, "to be shipped from Sweden, in June, July, August, and September, and about equal quantities each month, with an option to commence earlier." The defense was that the plaintiffs did not commence earlier, and shipped only twenty-one tons in June, and were not ready to deliver those until the month had expired. The defendants thereupon refused to go on with the contract, and gave notice accordingly. The judges speak very plainly; p. 27, POLLOCK, C. B., "The only question is whether if a man who is bound to perform his part of a contract, does not do so, he can enforce the contract against another party;" and "whether if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay." Condition precedent is not the test. If, after the shipment had been made and accepted, the seller had sent a short quantity, that might have made a difference. But the defendants in this case "were no more bound to accept the short quantity than if a single delivery had been contracted for;" and p. 29, CHANNELL, B., "The defendants have not accepted anything which can be construed as an imperfect execution of the contract by the plaintiffs. The defendants were thus at liberty to rescind the contract."

This is a very instructive case, and the remarks of the judges are deserving of great consideration.

That case differs from the present one in this, that in *Hoare v. Rennie*, the plaintiffs did aver that they had performed and done all things necessary on their part. But the same claim was made there that the contract was to deliver the coal in four months, and not month by month.

Where the agreements are entirely independent, or where the contract is severable, there may in some cases be a suit without performance or full performance by the plaintiff. And the parties may include in one instrument matters so distinct, or make their intention so plain that the court must adopt that construction. But where the thing to be done on one side is the consideration for the thing to be done on the other, the court will lean toward considering them as dependent or conditional, i. e., one cannot sue the other without showing performance, or an offer of performance on his part. And this especially in the case where money is to be

paid for something done or delivered, when it could not be supposed that the intention of the parties was that the money was to be paid without performance on the other side.

But it is difficult to reconcile the cases, and especially some of the older ones, to our notions of justice.

And Williams, whose notes to Saunders' Reports are of almost equal authority with the work he edits, is obliged to say that "almost all the old cases, and many of the modern ones, on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule" as to what agreements are independent or dependent. "The judges in these cases seem to have founded their construction * * * on artificial and subtle distinctions, without regarding the intention and meaning of the parties or the good sense of the case; and technical words should give way to such intention." 1 Williams' Saunders, 320 *a*, n. (4)).

This is a very lawyer-like and respectful way of saying what Lord KENYON said in much plainer language.

In *Jonassohn v. Young*, 4 B. & S. 296, which was a contract by the plaintiffs to sell and deliver, and by the defendant to purchase, so much coal as one vessel could bring in nine months, the defendant to send the vessel, the plaintiffs alleged that the defendant did not send the vessel. The defendant pleaded that before any breach of the contract by him the plaintiffs broke it by sending inferior coal, wholly unfit, as the plaintiff well knew, for their use, etc., etc. Judgment for plaintiffs, but no opinion delivered. It is evident, however, that the court did not consider time as essential.

In *Simpson v. Crippin*, A. D. 1872, L. R., 8 Q. B. 14, the defendant agreed to supply the plaintiff with 6,000 to 8,000 tons of coal, to be delivered in plaintiff's wagons at the defendant's colliery, in equal monthly quantities during twelve months. The first month the plaintiff took only 158 tons, and the defendant notified him that he rescinded the contract. The plaintiff refused to consider it annulled, and sued for damages. The judge on the trial told the jury that as the plaintiff did not intend to break the contract month by month, but only broke it the first month, the defendant could not rescind it. Verdict for plaintiff. On motion for a new trial, the Queen's Bench, by a majority, sustained the verdict; one judge observing that there did not appear to be any sufficient reason why damages would not compensate the defendant for the breach by the

plaintiff, and another judge observing that there were no words in the case to show that time was of the essence of the contract.

It was argued by the counsel in this case that the contracts for the different months were entirely independent of each other, and the court must have so considered them: rather a strained construction.

It is very evident that the decision in the cases of *Simpson v. Crippin* did not meet with the approval of the profession in England. The argument against it is strong. The question, it is said, is whether, in a contract for a series of acts, the party originally entitled to call for the performance of the last act will be still entitled to recover, although he has not performed his part of the preceding acts. It would be unjust that he should do so; it would damage trade by making it impossible to calculate upon the future; and the very purpose of such contracts would be frustrated. 17 Solicitors' Journal, 219.

And it seems to us that when articles are to be furnished in certain quantities per week or per month, and there is no waiver of the condition, the decision in *Simpson v. Crippin* really makes a new contract for the parties, instead of carrying out the one actually made by them. The agreement was to deliver a particular quantity per month. It is difficult to understand how that part of the agreement could be held to be immaterial unless there was evidence of a subsequent waiver, or some other evidence that is not reported; and a party should not be compelled to resort to a cross action in such cases.

In the case of *Bowes v. Shand*, before the English House of Lords, L. R., 2 App. Cas. 455, which was a case of a contract for the purchase of rice, to be delivered at one time only, it was claimed that the purchaser was obliged to take the rice and to resort to a cross action for any damages. This claim was pointedly repudiated by two of the judges, and not deemed worthy of notice by the others. See pages 461, 467, 480.

In cases of a contract of sale, so far completed or executed as to pass the title to the property, where the purchaser having paid the money cannot resort to a claim for deduction or recoupment, a cross action might indeed in many cases be the only remedy.

The case of *Boone v. Eyre*, cited by the plaintiff, 1 H. Bl. 273, note, was this: The plaintiff had sold an estate with some negroes, with the usual covenants for title, for a sum in gross and an annu-

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ity. It would seem, from the criticisms on the case, that the facts were that the estate, etc., had been conveyed, but that the title to some of the slaves failed. On suit by the plaintiff for the annuity, the defendant pleaded that plaintiff had no title to the slaves; but the court sustained the demurrer to the plea, holding that the covenants were independent.

The true ground of the decision would seem to be, that the defendant had the advantage of the performance of the substantial part of the agreement, and should not be permitted by his plea to prove non-performance in some small particulars, and so defeat the plaintiff's entire claim, but for such matters should be left to his cross action. See remarks of LE BLANC, J., in *Glazebrook v. Woodrow*, 8 T. R. 366, 375, and of LAWRENCE, J., 373; and, see remarks of ASHHURST, J., quoted in *Campbell v. Jones*, 6 T. R. 573. See, also, *Hoare v. Rennie*, 5 H. & N. 19, 25, 29, and *Ritchie v. Atkinson*, 10 East, 295, 306.

In *Ritchie v. Atkinson*, 10 East, 295, a vessel was to bring a complete cargo from St. Petersburg. After loading in part, she left, for fear of an embargo, before getting a full load. It was held that the master could recover. This, in the modern cases, would be explained by saying that the master having exercised his best judgment, and the freighter having received a benefit, he should pay for that benefit, deducting any damages. So in *Havelock v. Geddes*, 10 East, 555.

It seems strange that of the almost infinite variety and number of cases of contract coming before the courts, there should have been so few where the agreement was for successive deliveries at more or less definite periods; and that when they have occurred, the decisions should have been so conflicting. This conflict has arisen, partly, we think, from applying to this class of contracts, distinguished from all others by this marked peculiarity, principles of decision which properly belonged only to other classes of contracts.

In cases of contracts for successive deliveries the doctrine of condition precedent becomes more difficult of application. So also when in such cases the articles already delivered have been used, it becomes impossible for the party rescinding to return them and put the other party in *statu quo*.

In the progress of improvement in mechanics and the arts, old systems of labor and of trade are changing, each branch of business

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becomes more and more subdivided, and in consequence, every subdivision becomes more and more dependent upon others, and upon the strict and honest performance of the portion of the work they contribute toward the final product. And thus it is becoming more and more important, as this interdependence of different branches of trade increases, that contracts of this sort should be carried out according to their spirit and object, without regard to the mere technicalities, and we might well say, quibbles, of the older decisions.

We think the decision we have made the one which carries out the spirit and object of this particular contract, as it would be generally, and we think rightfully, construed by the business community.

The charge not directly made, but incidentally thrown out, that the defendants were induced to rescind, from the expectation that they would be able to get the same goods at a lower rate from other sources, is not supported by a tittle of evidence. It is entirely denied by the defendants. The market had indeed been a falling market ever since the war, and this fact, the defendants claim, rendered it all the more important that they should receive their supplies punctually and without delay.

Judgment for the defendants for their costs.

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(18 R. L. 92.)

Vendor's lien — married woman.

A vendor's lien subsists against a married woman. (*See note, p. 614.*)

BILL to establish a vendor's lien. The opinion states the case.

B. N. & S. S. Lapham, for complainant.

James Tillinghast, for respondents.

POTTER, J. In this case the complainant claims a lien on the property sold by the deceased for the unpaid purchase-money, and which lien it is alleged has not been waived or released.

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The vendor's lien for unpaid purchase-money is established in our mother country and in many of our States as a part of their equity system, and may well be considered as introduced with that system here, unless there is something in our laws and usages inconsistent with it.

The vendor's lien is enforced against the vendee himself and his heirs, against his widow, against a voluntary conveyance, and against a purchaser for value with notice, but not against a *bona fide* purchaser for value without notice.

As to conveyances to or attachments by creditors for antecedent debts, the decisions in this country are conflicting. Undoubtedly a person advancing money on mortgage, for an entirely new consideration without notice, ought to be and would be protected as a *bona fide* purchaser. If the vendor had taken a mortgage and neglected to record it, a subsequent purchaser without notice would be preferred to the vendor. And we think that the weight of reason and authority is in favor of this conclusion.

It has always been the policy of our laws to encourage registration and publicity of conveyances in order to guard against fraud. Secret conveyances and attachments are here discouraged.

With the limitations which we have stated guarding the doctrine, there would be nothing in it inconsistent with our ancient policy, or which would lead to any conflict with it.

The remarks of MARSHALL, C. J., in *Bayley v. Greenleaf*, 7 Wheat. 46, 57, are very sensible: "The lien of the vendor, if in the nature of a trust, is a secret trust; and although to be preferred to any other subsequent equal equity unconnected with a legal advantage or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equity connected with such advantage."

In the present case the deed was made to a married woman, who made a mortgage back signed by herself alone without her husband. This pretended mortgage is nothing more than waste paper. The vendor has not had the consideration agreed on and for which the land was sold. No other rights have intervened which under the rule given by MARSHALL, C. J., should have preference, and we think the complainant is entitled to relief.

It is contended by the counsel for the respondents that such a claim cannot be enforced against a married woman, but he refers

to no authority in point, and see *Chilton v. Braiden's Adm'r*, 2 Black, 458.

The lien does not stand on the ground of contract, but on the ground of an equity of the vendor, to be enforced against the vendee and all persons claiming under him, except in the cases we have mentioned.

And the formal acknowledgment of the receipt of the consideration in a deed under seal is of no avail if the money was not actually paid. Equity will look at the real facts in the transaction, although a court of law might in some cases be precluded from doing so. Sugden on Vend. & Pur., ch. 18, §§ 2, 17; 2 Story's Eq. Jur., § 1225.

Demurrer overruled.

NOTE BY THE REPORTER — To the same effect, *Jackson v. Rutledge*, 3 Lea, 626; s. c., 31 Am. Rep. 655. The principal case is *novus res* in Rhode Island. It was doubted in *Perry v. Grant*, 10 R. I. 334, whether a vendor's lien would be recognized in that State, and it was held that it could be waived. The court said: "The existence of this species of lien is perfectly well established in England, and has been widely, but not universally, recognized in this country. It was borrowed from the civil law, and appears to have grown into favor in England at a time when the remedy for debt against real estate was very imperfect. In such circumstances it is easy to see why the courts were so ready to uphold the lien. The reason given in its support is, that a person who has obtained the estate of another ought not, in conscience, to keep it and not pay the consideration money in full,—a reason which would apply as well in support of a lien in favor of the vendor of personal as of real estate, if real estate were as liable as personal to be taken for debt. Yet even in England the lien has not been an unmixed benefit, for inasmuch as it rests upon an implication which is open to rebuttal by parol testimony, it is exposed to the uncertainties which appertain to that kind of testimony. In *Mackreth v. Symmons*, 15 Ves. 329, Lord Eldon said: 'It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequence of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist.' In this country the doctrine has met with much adverse criticism, not only on the grounds indicated by Lord Eldon, but also on the ground that the existence of the lien is inconsistent with the policy of our recording acts, and is an embarrassment to that facility in the transfer of real estate which is favored by our legislation. The American cases on the subject are very fully collected in a note in *Perry on Trusts*, § 232. From that note it appears that the lien is recognized in the courts of the United States, and in the courts of a majority of the States in which its existence has been considered, but that in Massachusetts, New Hampshire, Connecticut and Delaware its existence has not been recognized by judicial decision; and that in Maine, Pennsylvania, North Carolina and Kansas it has been judicially repudiated. In Vermont and Virginia the lien, after having been recognized by the courts, was abolished by the legislatures. In this State the lien has neither been recognized nor considered by the courts. Where security is desired, the practice here is for the vendor to convey his land and take a mortgage back. This, the mortgage being recorded, furnishes security in a safe and perfectly unexceptionable form. It would be matter of regret if this practice should ever be to any extent superseded by a reliance upon the vendor's lien; and therefore, if it were indispensable in this case to decide whether the lien exists in this State, we should wish to give the question a very careful consideration and inquiry."

KELLEY V. SILVER SPRING CO.

(12 R. I. 112)

Master and servant — negligence — defective machinery.

An adult employee, injured by imperfect and unfenced machinery, cannot maintain an action against his employer where he himself was familiar with the machinery and had long worked with it without complaint. (*See note, p. 621.*)

ACTION of negligence. The opinion states the case.

Francis W. Miner & William G. Roelker, for plaintiff.

Benjamin F. Thurston and E. C. & S. Ames, for defendant.

DURFEE, C. J. This is a petition for the new trial of an action of the case for negligence resulting in the mutilation of the plaintiff's hand. The action was tried to a jury in this court, at the October Term, 1875. The testimony then submitted by the plaintiff was to the following effect, to wit:

The plaintiff was injured January 12, 1874. He then was, and for four years had been, in the employ of the defendant corporation in its dye-house as a gig-tender. A gig is a machine consisting of two rollers, set in a frame, which are made to revolve by gears connected with the main shafting of the dye-house, from which they receive their motion. The instrument by which they are connected is called the shipper or shipping apparatus. The gig is used, in the process of dyeing, to cause a roll of cloth to work down from one of the rollers into a vat of dyeing liquor and there to wallow a while, and then to come up and be rolled on the other roller. There were several gigs in the dye-house. The gig operated by the plaintiff was nearest the corner which contained the driving gears of the main shafting. These gears revolved with an upward motion, so that they would not be likely to injure any person, unless he came in contact with them from below. They revolved behind a boarding or boxing; but previous to the accident, some four or five inches of the lower part of this boarding or boxing had been broken away so as to expose them. The plaintiff testified that the gears had been so exposed for several weeks, but

that he had never complained of the defect or called attention to it; also, for some weeks prior to the accident, the plaintiff's gig had been out of repair. He complained of the defects to the company's agent, but the agent declined to repair them, saying that the company would not furnish the necessary materials. The defects were in the gears of the gig and in the clutches of the shipping apparatus. The gears were defective from loss of teeth, so that when they were in motion there was a constant jar caused by the broken teeth. The clutches of the shipping apparatus were worn, so that the jar of the gigs caused them to slip apart and the gigs to stop, thus impeding the work and tending to injure the cloth which was dyeing. These defects were aggravated by the unevenness of the floor where the gig stood. The plaintiff, after the company's agent had refused to repair his gig, resorted to a contrivance which was quite commonly used by employees in the dye-house whose gigs troubled them in a similar manner. The contrivance was a rope or string, one end of which was, in the case of the plaintiff, fastened to an iron brace near the boxing of the corner gears, and the other end of which was fashioned into a loop or noose, which, being slipped over the shipper, kept it from displacement, and so insured a more regular operation of the gig. The company's agent probably knew of this use of the rope or string and did not object to it, but there was no positive testimony that the company ever otherwise authorized or approved of it. On the 12th of January, 1874, the plaintiff commenced work in the dye-house at 7 o'clock A. M. At that hour the light was still imperfect. The room, too, was full of steam or vapor rising from the liquors boiling in the vats, so that at the sides and in the corners it was difficult to see with distinctness. In the corner occupied by the plaintiff there was no light to lessen the obscurity. The accident occurred at 15 minutes after 7 o'clock in the morning. The plaintiff was looking or feeling for the rope, the looped end of which had fallen on the floor, and having found it, was lifting it between his thumb and forefinger when his little finger, catching in the corner gears, drew his hand after it, causing the injury complained of. He was at the time thirty years of age, and for any thing that appears, of ordinary intelligence. After the accident the corner gears were more completely covered and the floor and gig repaired.

The testimony submitted by the plaintiff was contradicted in several of its most vital points by the testimony submitted by the

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defendant corporation. The defendant presented numerous requests for specific instruction to the jury, which the court either declined to grant or granted with qualifications. The petition for a new trial rests on the grounds that the verdict was against the evidence, and against the law as laid down by the court, and that the court erred in refusing to instruct the jury as requested. We do not think it is necessary, in the view which we take of the case, to state in detail either the testimony of the defendant or the requests for instruction. The fundamental question, however variously it may be presented, is whether, on the plaintiff's own testimony, there is any case which entitles him to a verdict. We will address ourselves directly to that question, assuming for that purpose that the testimony submitted by the plaintiff is true.

The plaintiff claims that the injury which he received resulted from a combination of causes, for each of which the defendant was to blame. He contends that if the room had been duly lighted, or if the gig had been kept in good working order, or if the corner gears had been properly boxed, the accident would not have occurred. He also contends that the corporation negligently permitted these causes to exist when it was under obligation to him, as its employee, to remove them or protect him against them. Let us consider whether this proposition can be maintained.

1. Was the corporation under any obligation to have its dye-house lighted on the morning of the accident? It does not appear that it had ever been usual to light up even on the shortest mornings. The plaintiff, who had worked four years as gig-tender, must have known that the room was not likely to be lighted. If then the absence of lights was dangerous, it was a danger incident to his employment which he voluntarily incurred. We do not find a particle of evidence to support the claim that the corporation was under any obligation to the plaintiff to have the room lighted, unless the exposure of the corner gears made it obligatory, and we shall hereafter consider whether it was bound to guard him against that danger.

2. Was the corporation under any obligation to the plaintiff to keep his gig in good working order? We cannot find that it was. **A** manufacturer has the right to keep a machine in use after it has become old and defective, unless its defects expose the operative to some latent or extraordinary danger. *Hayden v. Smithville Manufacturing Company*, 29 Conn. 548. It is not pretended that the

gig on which the plaintiff worked exposed him to any such danger. It endangered not him, but the cloth which was dyed on it. The plaintiff concedes this, but he urges that its defects led him to have recourse to the string, and the use of the string led to his injury by the gears. The string, however, was his own contrivance. If it was dangerous, he must have known in what way it was dangerous, at least as well as the defendant. Even if the defendant, by not objecting, can be held to have approved or authorized the use of the string, it did not direct its use, and therefore did not make its contrivance and use any less the voluntary act of the plaintiff. If its contrivance and use was a fault it was a fact in which the plaintiff, if not solely responsible for it, at least participated, and therefore on familiar principles, he cannot charge the defendant. But strictly speaking, any consideration of the string is immaterial, unless the defendant is responsible to the plaintiff for the exposure of the corner gears; for the string was not dangerous in itself, but dangerous only by reason of its attachment to the iron brace near those gears. We therefore come to the really important question in the case.

3. Was the corporation under any obligation to the plaintiff to repair the defect in the boxing of the gears? The testimony does not show precisely how long the plaintiff had tended the gig nearest the gears, nor when the gears became dangerous. The danger may possibly have existed when he first accepted service on the gig. If so, the danger being manifest, he must be held to have assumed the risk from it; for a person who voluntarily enters a dangerous service, knowing the danger, takes the risk upon himself and cannot look to his employer for damages if he is injured. We infer, however, that the gears became dangerous by the breaking of the boxing after his service near them began. This being so, if when the danger occurred, the plaintiff had notified the defendant of it, and had been induced to remain in his position by assurances that it should be remedied, or, as some of the cases hold, by a reasonable expectation that it would be remedied, then it would not necessarily be presumed, from his knowledge of the danger, that he had assumed the risk. *Holmes v. Clarke*, 6 H. & N. 349; 7 id. 937; *Holmes v. Worthington*, 2 Fost. & F. 533; *Patterson v. Pittsburgh & Connellsville Railroad Company*, 76 Penn. St. 389; s. c., 18 Am. Rep. 412; *Kray v. Chicago, R. I. & P. R. Company*, 32 Iowa, 357. But the plaintiff did not notify the defendant of the danger. He remained exposed to it for weeks without protest or complaint. He must therefore

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be held to have consented to the exposure, and so, upon familiar principles, cannot recover for the injury received in consequence. This is so clear that it seems hardly necessary to cite cases in support of it. We will however refer to a few of the many cases which are in point.

The case of *Sullivan v. India Manufacturing Company*, 113 Mass. 396, closely resembles the case at bar. There a boy of fourteen was caught in the gearing of a machine near which he was employed. The court ruled that if he had such instruction or knowledge as would enable him with reasonable care to do his work with safety, the defendant would not be liable, no matter where the knowledge was obtained. On motion for a new trial, after verdict for the defendant, the court thus stated the law: When the employee "assents to occupy the place prepared for him and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might with reasonable care and by reasonable expense have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no ground of complaint, even if reasonable precautions have been neglected."

This was declaring the law strongly as applied to a boy of fourteen; but we do not think it is too strong for a man of the plaintiff's age and experience.

In *Sullivan's Administrator v. Louisville Bridge Co.*, 9 Bush, 81, the plaintiff's intestate fell from a narrow plank erected over a river where he and others were engaged to pass stones for the construction of a bridge. It appeared that he and others had hesitated before the accident about going on the plank, but being told to do it or go home, had done it, and falling into the river was drowned. The court refused to disturb a verdict for the defendant, upon the ground that he had voluntarily taken the risk.

In *Ladd v. New Bedford Railroad Co.*, 119 Mass. 412; s. c., 20 Am. Rep. 331, the plaintiff, an employee of the corporation, was riding in a railway car which was thrown down a bank. One cause of the accident was alleged to be a want of check-chains. But it appeared by the testimony of the plaintiff, who had long been in the employ of the corporation, that he knew that some of the trains

were without check-chains, and had said they were not safe. It was held that he was not entitled to recover for the injury he had received, on the ground that he had voluntarily taken the risk.

In *Dillon v. Union Pacific Railroad Co.*, 3 Dill. 320, the plaintiff, who was a locomotive engineer, was put in charge of an engine which had no signal bell, and the court held that he was not entitled to recover for an injury which he claimed to have suffered in consequence, because he knew when he took service on the engine that it had no signal bell. See, also, to the same effect, *Ogden v. Rummen*, 3 Fost. & F. 751; *Dynen v. Leach*, 26 L. J. (N. S.) Exch. 221; *Gibson v. Erie R. R. Co.*, 63 N. Y. 449; s. c., 20 Am. Rep. 552.

It is true the rule is not rigidly enforced against persons who are too young or too ignorant to appreciate the dangers to which they are exposing themselves. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Grizzle v. Frost*, 3 Fost. & F. 622; *Laning v. N. Y. Central R. R. Co.*, 40 N. Y. 521; s. c., 10 Am. Rep. 417; *Hill v. Gust*, 55 Ind. 45. And especially if the employer permits the danger to exist in violation of the statute law. *Britton v. Great Western Cotton Co.*, L. R., 7 Exch. 130.

But in the case at bar we find no such reason for relaxing the rule. In this State there is no statute requiring a manufacturer to fence or cover his machinery. And the plaintiff had age, intelligence and experience enough to appreciate the risk he was running. Indeed he does not pretend that he did not appreciate it. His case is the bald case of a person who continues to work where he is exposed to a danger which he knows and fully appreciates without complaining of it, and without any promise or assurance that it shall be remedied, and not merely for some temporary purpose or under stress of some special exigency or request, but deliberately and for days and weeks together, and therefore, whatever the risk, he must be held to have consented to it as one of the perils of his employment.

We think the plaintiff, even on the testimony as presented by himself, is not entitled to recover, and consequently that the verdict should be set aside as being against the evidence, and a new trial granted.

Petition granted.

POTTER, J., concurring specially.

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NOTE BY THE REPORTER.—The subject of a master's liability to his servant for an injury by defective machinery was very fully discussed in *Hough v. Texas and Pacific Ry. Co.*, 100 U. S. 212. The court, by HARLAN, J., observed :

"The principal question arising upon the assignments of error requires the consideration, in some of its aspects, of the general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow-servant in the same employment.

" 'The general rule,' said Chief Justice SHAW, in *Farwell v. Boston and Worcester Ry. Co.*, 4 Metc. 49, 'resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other.'

"To prevent misapprehension as to the scope of the decision, it was deemed necessary, in a subsequent portion of his opinion, to add: 'We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for the loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company — are questions on which we give no opinion.'

"As to the general doctrine to which we have adverted, very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in the practical application of the rule in the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages — what are the perils which, in legal contemplation, are presumed to be adjusted in the stipulated compensation — who, within the true sense of the rule, or upon grounds of public policy, are to be deemed fellow-servants in the same common adventure or undertaking — are questions in reference to which much contrariety of opinion exists in the courts of the several States. Many of the cases are very wide apart in the solution of those questions.

"It would far exceed the limits to be observed in this opinion, and it is not essential in this case to enter upon an elaborate or critical review of the authorities upon those several points. Nor shall we attempt to lay down any general rule applicable to all cases involving the liability of the common employer to one employee for the negligence of a co-employee in the same service. It is sufficient to say that while the general doctrine, as stated by Chief Justice SHAW, is sustained by elementary writers of high authority, and by numerous adjudications of the American and English courts, there are well defined exceptions, which, resting as they clearly do upon principles of justice, expediency and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

"One, and perhaps the most important of those exceptions, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities, adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least, in the same work or employment, with whose habits, conduct and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is

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equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard, usually or necessarily attended upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance, in suitable condition, after they have been supplied by the master.

"In considering what dangers the servant is presumed to risk, the court, in *Railroad Co. v. Fort*, 17 Wall. 557, said: 'But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction.'

"A railroad corporation may be controlled by competent watchful and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain in suitable condition, the machinery and apparatus to be used by its employees — an obligation the more important and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least in the organization of the corporation, who are invested with controlling or superior authority in that regard, represent its personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.

"To guard against misapplication of these principles we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty, in that respect, to its employee is discharged when, but only when, its agents whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.

"The principles we have announced are sustained by the great weight of authority in this country, as an examination of adjudged cases and elementary treatises will abundantly show.

"A leading case is *Ford v. Fitchburg R. R. Co.*, 110 Mass. 241; s. c., 14 Am. Rep. 588. That was an action by an engineer to recover damages for injuries caused by the explosion of his engine, which was old and out of repair. His right to recover was disputed upon the ground that the want of repair of the engine was due to the negligence of fellow-servants in the department of repairs.

"But the court said: 'The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by

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officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule, relied on to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require.' In a subsequent portion of the same opinion the court said: 'The corporation is equally chargeable whether the negligence was in originally failing to provide or in afterward failing to keep its machinery in safe condition.'

"The same views, substantially, are expressed by Mr. Wharton in his treatise on the Law of Negligence. The author (§ 211) says: 'The question is that of duty; and without making the unnecessary and inadequate assumption of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty of an employer inviting employees to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use.' Again (§ 212): 'At the same time we must remember that where a master personally, or through his representatives, exercises due care in the purchase or construction of buildings and machinery, and in their repair, he cannot be made liable for injuries which arise from casualties against which such care would not protect. It is otherwise if there be a lack in such care either by himself or his representatives. The duty of repairing is his own: and as we shall hereafter see, the better opinion is, that he is directly liable for the negligence of agents when acting in this respect in his behalf. If the master knows, or, in the exercise of due care, might have known, that * * * his structures or engines were insufficient, either at the time of, procuring them or at any subsequent time, he fails in his duty.' Still further, in reference to the obligation upon the master to supply suitable machinery for working use (§ 232 a): 'It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases in which it is impossible for it to be negligent personally. But if this be true it would relieve corporations from all liability to servants. The true view is, that as the corporation can act only through superintending officers, the negligences of those officers, in respect to other servants, are the negligences of the corporation.'

"The current of decisions in this country is in the same direction, as will be seen from an examination of the authorities, some of which are cited in the note at the end of this opinion.

"It is, however, insisted that the defense is sustained by the settled course of decisions in the English courts. It is undoubtedly true that the general doctrine of the immunity of the master from responsibility for injuries received by his servant from a fellow-servant in the same employment has, in some cases, been carried much further by the English than by the American courts. But we cannot see that upon the precise question we have been considering, there is any substantial conflict between them. That question was not, as is supposed, involved, it certainly was not decided, in *Priestly v. Fowler*, 3 M. & W. 1. The decision there was placed by Lord ALINGER, partly upon the ground that in the 'sort of employment especially described in the declaration (transporting goods of the master by one servant, in a van, conducted by another of his servants) * * * the plaintiff must have known as well as the master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely.' But even in that case, although the court declared it was not called upon to decide how far knowledge upon the part of the master, of vices or imperfections in the carriage used by the servant injured would make him liable, it was said: 'He (the master) is no doubt bound to provide for the safety of the servant in the course of his employment, to the best of his judgment, information and belief.'

"The question came before the House of Lords in *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748, and again in 1858, in *Bartonhill Coal Co. v. Reid*, 3 id. 288. In the last-named case Lord CRANWORTH said that it was a principle established by many preceding cases, 'that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks.' This he held to be the law in both Scotland and England. At the same sitting of the House of Lords, *Bartonhill Coal Co. v. McGuire*, 3 id. 307, was

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determined. In that case Lord Chancellor CHELMSFORD delivered the principal opinion, concurring in what was said in the *Reid* case. After referring to the general doctrine as announced in *Priestly v. Fowler*, and recognized subsequently in other cases in the English courts, he said: 'In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case, to ascertain whether the fellow-servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants therefore are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him.'

"Upon the same occasion Lord BROUGHAM, referring to the remark of a Scotch judge to the effect that an absolute and inflexible rule, releasing the master from responsibility in every case where one servant is injured by the fault of another, was utterly unknown to the law of Scotland, said: 'But, my lords, it is utterly unknown to the laws of England also. To bring the case within the exemption there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that employment.' 3 *id.* 313.

"An instructive case is *Clarke v. Holmes*, decided in 1862, in the Exchequer Chamber upon appeal from the Court of Exchequer, 7 H. & N. 987. There the plaintiff was employed by the defendant to oil dangerous machinery, and he was injured in consequence of its remaining unfenced. He had complained of the condition of the machinery, and the manager of the defendant, in the latter's presence, promised that the fencing should be restored. In the course of the argument counsel for the defendant relied upon *Priestly v. Fowler*, claiming it to have decided that whenever a servant accepts a dangerous occupation he must bear the risk. He was, however, interrupted by Cockburn, C. J., with the remark: 'That is, whatever is fairly within the scope of the occupation, including the negligence of fellow-servants; here it is the negligence of the master.' CHAMPTON, J., also said: 'It cannot be made part of the contract that the master shall not be liable for his own negligence.'

"In the opinion delivered by Cockburn, C. J., it was said: 'I consider the doctrine laid down by the House of Lords in the case of *Bartonshill Coal Co. v. Reid*, as the law of Scotland with reference to the duty of a master, as applicable to the law of England also, namely, that when a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur.' Again, in the same opinion: 'The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept.'

"BYLES, J.: 'But I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. * * * The master is neither on the one hand at liberty to neglect all care, nor on the other is he to insure safety, but he is to use due and reasonable care. * * * Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow-servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less he will be liable.'

"To the same effect is the recent case of *Murray v. Phillips*, decided in 1876 in the Exchequer Division of the High Court of Justice, 35 L. T. Rep. 477.

"It is scarcely necessary to say that the jury were not correctly informed by the court below as to the legal principles governing this case. It is impossible to reconcile the gen-

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eral charge, or the specific instructions, with the rules which we have laid down. They were, taken together, equivalent to a peremptory instruction to find for the company. The jury may have believed from the evidence that the defects complained of constituted the efficient proximate cause of the death of the engineer; that such defects would not have existed had the master mechanic and foreman of the round-house exercised reasonable care and diligence in the discharge of their respective duties touching the machinery and physical appliances supplied to employees engaged in running trains; and that the deceased was not chargeable with contributory negligence; yet consistently with any fair interpretation of the charge and the specific instructions they were precluded from finding a verdict against the company.

"One other question arising upon the instructions, and which has been discussed with some fullness by counsel, deserves notice at our hands. It is contended by counsel that the engineer was guilty of such contributory negligence as to prevent the plaintiff from recovering. The instruction upon that branch of the case was misleading and erroneous.

"The defect in the engine, of which the engineer had knowledge, was that which existed in the cow-catcher or pilot. It is not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect was of such a character that he should have become advised of it while using the engine on the road. But he did have knowledge of the defective condition of the cow-catcher or pilot, and complained thereof to both the master mechanic and the foreman of the round-house. They promised that it should be promptly remedied, and it may be that he continued to use the engine in the belief that the defect would be removed. The court below seem to attach no consequence to the complaint made by the engineer, followed, as it was, by explicit assurances that the defect should be remedied. According to the instructions, if the engineer used the engine with knowledge of the defect, the jury should find for the company, although he may have been justified in relying upon those assurances.

"If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery so far as such defect was found to have been the efficient cause of the death. He would be held in that case to have himself risked the dangers which might result from the use of the engine in such defective condition. But 'there can be no doubt that where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.' *Shearm. & Redf. on Neg.*, § 96; *Conroy v. Vulcan Iron Works*, 62 Mo. 38; *Patterson v. P. & C. R. W. Co.*, 76 Penn. St. 389; s. c., 18 Am. Rep. 412; *Le Clair v. R. R. Co.*, 20 Minn. 9; *Brabbitts v. R. W. Co.*, 88 Mo. 289; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 241; s. c., 14 Am. Rep. 598. 'If the servant,' says Mr. Cooley in his work on Torts, 559, 'having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks.'

"And such seems to be the rule recognized in the English courts. *Holmes v. Worthington*, 2 Fos. & Fin. 533; *Holmes v. Clarke*, 6 Il. & N. 849; *Clarke v. Holmes*, 7 id. 942. We may add that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without its being removed. If under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part. 110 Mass. 261; 49 N. Y. 521. In such a case as that here presented the burden of proof to show contributory negligence was upon the defendant. *Railroad Co. v. Gladman*, 15 Wall. 401; *Wharton's Law of Negligence*, § 483, and authorities there cited in note 1; 93 U. S. 291."

BUTCHER V. PROVIDENCE GAS CO.

(12 R. I. 149.)

Negligence — control of dangerous element — gas escape.

Plants in plaintiff's greenhouse were injured by the escape of gas from the defendant's mains, laid in a city street, through a city sewer, owing to the negligence of the city in building the sewer. *Held*, that defendant was liable.

ACTION of negligence. The opinion states the case. The plaintiff had judgment below.

James Tillinghast and J. A. Gardner, for plaintiff.

Charles S. Bradley and Charles P. Robinson, for defendant.

POTTER, J. The plaintiff sues to recover damages for injuries to his plants in a greenhouse, caused by the defendant's neglect in allowing illuminating gas to escape from their pipes into the city sewers and drains, and thence into the plaintiff's greenhouse.

After verdict for the plaintiff the defendant moves for a new trial, on the ground that the verdict was against the evidence and also for certain misrulings.

The contention on the part of the defendant is that there was no negligence on their part, and that the escape of gas was from causes over which they had no control; namely, the negligence of the officers of the city.

The judge charged the jury substantially that the questions before them were whether the gas did escape from the defendant's mains, and whether that caused the trouble; and if so, whether it escaped through defendant's negligence; that the defendant was bound to exercise reasonable care, and the degree of care depended on the degree of danger; that it increased with the degree of danger if they had a dangerous element under their control; that the defendant contended it was the fault of the city, whose officers, in putting in a sewer, had not packed back the dirt properly, and so the settling of the dirt had broken the defendant's pipe; that if the city was liable it did not follow that the defendant was excused; but if others were at work around the pipes a new duty was imposed on it to guard against the want of care in others, and to use proper care in remedying defects caused by such want of care; and

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that when the defect was discovered the defendant should have adopted reasonable remedies to prevent injury; that if the injury resulted from the joint carelessness of plaintiff and defendant, plaintiff could not recover; that the defendant contended the plaintiff might have prevented the damage by using a proper trap; that while that might have been proper in guarding against sewer gas, it was for the jury to consider whether he ought to expect to find, or be bound to guard against illuminating gas in a common sewer, and whether his not providing such a trap showed want of care on his part; that if as was claimed, other causes, such as furnace gas, co-operated in producing the injury, that would not excuse the defendant from liability for so much of the injury as the jury found was due to the negligent escape of gas.

The defendant, in its brief and argument, makes several points as to what could be negligence on the part of the defendant; *e. g.* whether they were bound or not to have some one constantly to watch the city work while it was in progress; that the defendant did have a competent person on watch; that the city's work was done by a man competent for the business, and who swears that the sewer and catch-basin were properly put in.

We think these matters were all properly left to the jury, and we cannot see that the verdict is against the weight of evidence.

The evidence as to the presence of the gas in other greenhouses was properly admitted. Evidence was put in to show that Smith's greenhouses were connected with the same sewers.

The evidence of Mr. Shedd, that it was possible for gas to escape in the way plaintiff claimed it did, was also properly admitted in rebuttal.

It is objected that certain evidence as to the proper construction of sewers and the contract of the city with the contractors was ruled out; that evidence that the defendant had complained to the water commissioners as to the mode in which they were constructing the sewers, and the fact that they, the agents of the city, refused to allow any one to interfere, was ruled out. The complaint in this case was not that the sewer was not properly built, but that the dirt, when put back, was not properly packed. And the contract of the city with the contractors could not alter the fact; it was not a question whether the city intended to do an injury, but a question of negligence on the part of the defendant in not properly guarding against the negligence of the city's officers.

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That certain evidence was rejected going to show the plaintiff had no right to connect with the city sewer. The court had ruled that the right would be presumed unless the contrary was shown, and the evidence offered was a vote of the city council and some evidence of custom, neither of which could alter the rights of the parties.

The instructions requested by the defendant, that the legal construction of its grant from the State was that the defendant had a right of property in the streets for the use of its pipes, and was not bound to inspect the pipes nor to remove them to prevent injury, unless the city gave it notice that the gas-pipes were in their way, and that it was unreasonable exactitude to require the defendant to have a person present at all times when the city was at work near its pipes, etc., were very properly refused, the latter being a matter for the jury under the instructions given as to the degree of care the defendant was bound to use.

We cannot find in the rulings or the evidence any thing to justify a new trial. The defendant, in managing a dangerous element, was bound not only to due care on the part of itself and its servants, but also to due care in preventing injury from the careless or wrongful meddling with its works on the part of others. They could not interfere with or prevent the city from building a sewer; but they had a right to and were bound to see that in restoring the earth to its place, their own pipes were properly supported, and if injured, to see that the injury was repaired as soon as it could reasonably be done.

Petition dismissed.

BENNETT V. LOVELL.

(12 R. I. 166.)

Negligence — fright of horse by articles left on highway.

The plaintiff sustained injury through the fright of his horse on a highway, by tubing and machinery left by defendant on the highway. *Held*, that defendant was liable. (See note, p. 630.)

ACTION of negligence. The opinion states the case. The plaintiff had judgment below.

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Elisha C. Clarke and Edmund S. Hopkins, for plaintiffs.

Nicholas Van Slyck, for defendant.

POTTER, J. The plaintiff and wife were thrown from their wagon and injured in consequence of their horse taking fright from some tubing and machinery which had been left upon a public highway by the defendant, who was carrying the same for the use of the city water-works.

Two questions were to be decided by the jury: Were the plaintiffs in the exercise of due care? Did the plaintiffs know of the dangerous nature of the machinery, or that it was calculated to frighten horses, and had they a right to suppose from their knowledge of the character and disposition of their horse, that they could pass in safety? Evidence was put in tending to show that the plaintiff's horse was gentle, and was walking at the time; that other teams had passed without accident, although several horses had been badly frightened; and evidence was offered to show that the plaintiff could not have reached his destination by any other route without travelling an additional distance of some miles.

The other question was, whether the defendant was negligent in his mode of transporting the machinery, or in leaving it upon the highway in the condition it was in.

It is not necessary to consider the act of the general assembly under which the defendant claims he was proceeding. That act might indeed protect the party from being indicted for a public nuisance, but could not protect him from the consequences of his negligent exercise of his rights as against other persons. It cannot be doubted that, independent of the act, the defendant had a right to transport his machinery over the highway; and as was stated by way of illustration, any person has a right to transport over the highway elephants and animals which may frighten horses. So, also, loads of goods which, from their height or appearance, or the noise made in transport, might terrify some horses. This right is undoubted, but it is to be so exercised as not to endanger the lives or property of others who have equal rights upon the highway. As in other cases of the use of a dangerous article, the required degree of care increases with the danger to be apprehended from the use of it and from exposure to it.

It is claimed on the part of the defendant that the facts being

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undisputed, the question of negligence is for the court. *Jackson v. Metropolitan Railway Company*, 26 W. R. 175; *Bridges v. North London Railway Company*, L. R., 7 H. L. 213. But we should be inclined to take the same view which the jury must have taken. The man, who claiming to be in the exercise of his own right to drive along the highway an object or animal, which from its appearance, noise or other offensiveness, is calculated to frighten horses, without taking precautions by having a sufficient number of persons in charge of it to warn others of the danger, and if need be, to aid them in passing it, for women and children have a right to drive on the highway as well as men, or who leaves such an object on the highway without proper precautions, cannot be said to be using that due care he ought to use, and which the law and a proper regard for the lives of his fellow-men and the common duty of humanity require of him.

Some evidence was put in tending to show that if the machinery had been boxed up it would have been still more likely to frighten horses. If so, more care would have been required from the defendants to prevent danger to others.

The objections to evidence we cannot consider as material.

The case has twice been submitted to a jury, and we do not think the verdict ought to be disturbed.

Petition dismissed.

NOTE BY THE REPORTER.—The like doctrine was held in *Fishay v. Glen Haven*, 25 Wis. 268; s. c., 8 Am. Rep. 73, the case of a burnt and blackened log; *Ayer v. City of Norwich*, 39 Conn. 376; s. c., 12 Am. Rep. 396; the case of a tent; *Young v. City of New Haven*, 38 Conn. 435, the case of a steam roller which had been used in repairing the street; *Bartlett v. Hooksett*, 48 N. H. 18, the case of a pig-sty, the noise of the pigs producing the fright of the horse; *Harris v. Mobbs*, Eng. C. P. 1873, the case of a horse van with ploughing gear attached; *Morse v. Richmond*, 41 Vt. 435, the case of charred bales of hay; *Winship v. Enfield*, 42 N. H. 199; *Chamberlain v. Same*, 43 Id. 358, cases of wood and lumber; and *Fritch v. City of Allegheny*, Penn. Supreme Court, October, 1879, the case of a dead horse. In the latter case the court said: "In the present case the obstruction complained of was not on a country road, in a rural district, but on an avenue in a city which in population ranks third in this Commonwealth. The subject-matter of the obstruction was an undoubted nuisance. A horse fell and died in this public avenue, about nine o'clock on the morning of the 12th of August. The body was suffered to lie there through all this mid-summer day. One of the witnesses testifies 'there was such a bad smell' that at about nine o'clock in the evening she sent to the mayor's office to notify him. At eight or nine o'clock the next morning the carcass remained there, and the injury complained of occurred. That it was well calculated to frighten a horse being driven along the avenue does not appear to be questioned. The same witness who testified as to the offensive odor, says: 'Many men went back again; couldn't pass; all the horses got frightened there.' The main ground of the defense is that the carcass had not remained there for such an unreasonable time as to create a presumption of negligence on the part of the city in not removing it, especially if not notified." *Cook v. Charlestown*, 13 Allen, 190, note, seems opposed, but there the city is not found to have had or been chargeable with notice.

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So, when a horse was frightened by a hole in a highway, *Brooksville, etc., Co. v. Pumphrey*, 59 Ind. 78; s. c., 28 Am. Rep. 76; or by a pile of plaster, *Dimock v. Suffield*, 30 Conn. 129; or a heap of ashes, *Ring v. City of Cohoes*, 77 N. Y. 83; s. c., 33 Am. Rep. 574; or by an exhibition of bears, *Little v. City of Madison*, 42 Wis. 643; s. c., 24 Am. Rep. 435. But otherwise of a moving steam traction engine, *Macomber v. Nichols*, 34 Mich. 212; s. c., 22 Am. Rep. 522, and note, 528; a daguerrean saloon with a loose canvas flapping on top, *Keith v. Easton*, 2 Allen, 552; a pile of gravel fifteen inches high, for repairs, *Kingsbury v. Dedham*, 13 Id. 186.

GOODELL V. FAIRBROTHER.

(12 R. I. 233.)

Contract — sale — lease of piano — attachable interest.

One who hires a piano, with an agreement that when and not until the rent amounts to a specified sum the piano should become his property, has no attachable interest before the payment of the full sum; the question whether the owner, by allowing the hirer to remain in possession as ostensible owner, is estopped from denying such ownership, is one of fact; and the burden of proof of non-fulfillment of the conditions of sale is on the owner.*

PROVER, against a deputy sheriff, for a piano levied on by him by attachment. The piano came into the possession of the defendant in the attachment under the following agreement:

“This agreement, made by and between Hibbard & Hawkins of the first part and Mr. Edward W. Guild of Providence of the second part, witnesseth that said Hibbard & Hawkins do hereby lease for the period of one month from date, and from month to month thereafter (so long as the stipulations herein are performed, and the payments hereinafter specified are duly made) to said party of the second part, a Decker Bros. piano, numbered 2034 for the sum of ——— dollars in advance, and ten dollars per week thereafter, to be paid to them at their office on the second day of each week for the use thereof; agreeing, however, that when the sum of \$525 shall have been paid for the use of said piano by said advance and monthly payments or otherwise, they will then sell and deliver to the party of the second part said piano with a good and effectual bill of sale thereof.

“And said party of the second part hereby pays the sum of

* See *Latham v. Sumner* (89 Ill. 233), 31 Am. Rep. 79, and note, 81.

— dollars in advance and agrees to hire and pay for the use of said piano from week to week as aforesaid, \$10 on each respective second day of the weeks, until the full amount of the price above named (\$525) shall have been paid. In case of failure to make said payments, or any of them, said party of the second part agrees to deliver up said piano to Hibbard & Hawkins or their order, in as good condition as the same now is, reasonable use and wear thereof excepted; in which case, or in case of a violation of any of the agreements herein mentioned, I hereby authorize, empower, and direct the said Hibbard & Hawkins, or their agent, to enter the premises wherever said piano may be and take and carry the same away; and I hereby exonerate the said Hibbard & Hawkins, their servants and agents, of and from all and any claim for damages which I might have against said Hibbard & Hawkins, their servants or agents, or any or either of them, for so doing; it being agreed by the parties hereto, that until the full price of said piano has been paid as above, it is the property of Hibbard & Hawkins, and is not to be removed from 289 Pine street without their consent; nor be secreted, disposed of, underlet, or attempted to be sold; nor be injured by misuse or neglect or by improper management.

“In witness whereof we hereunto subscribe our names.

“EDGAR W. GUILD,

“HIBBARD & HAWKINS.”

February 12, 1872.

The defendant had judgment below.

Daniel R. Ballou, for plaintiff.

Dexter B. Potter, for defendant.

DURFEE, C. J. The first ground assigned for a new trial is that the court instructed the jury that the plaintiff was not entitled to recover, if the defendant, when he took the piano, was acting as agent for the general owner; whereas the plaintiff claimed, and requested the court to charge, that the plaintiff acquired a special property in the piano by the attachment which would entitle him to maintain his action.

It is manifest that the plaintiff could not acquire any property in the piano, otherwise than by estoppel, unless Guild had a property in it which was liable to attachment. But Guild had no at-

Goodell v. Fairbrother.

attachable property in it; for by the terms of the contract under which he received the piano it was to remain the property of the vendors until it was fully paid for as stipulated, and at the time of the attachment only \$175 of the \$525, which under the contract ought to have been paid for it two years previously, had been paid. Guild therefore had merely a possession of the piano, but no right in it, unless possibly he might still in equity have a right to complete the purchase by paying the residue of the price with interest. But such a right, even if it existed, would not be a right of property but merely a right resting in contract, and would not be subject to attachment. This view is abundantly supported by authority. *Sage v. Slutz*, 23 Ohio St. 1; *Strong v. Taylor*, 2 Hill, 326; *Van Hoozer v. Cory*, 34 Barb. 9; *Leighton v. Stevens*, 22 Me. 252; *Ketcham v. Brennan*, 53 Miss. 596; *Burnell v. Marvin*, 44 Vt. 277; *Buckmaster v. Smith*, 22 id. 203; *Hubbard v. Bliss*, 12 Allen, 590; *Blanchard v. Child*, 7 Gray, 155; *Little v. Page*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 id. 24; *Southern v. Cunningham*, 11 Rich. 533.

The plaintiff contends that Guild had an assignable and therefore an attachable interest. It is doubtful if Guild had any right which he could assign, in view of the fact that the time for making the stipulated payments had expired, and that he was forbidden by the contract to sell the piano or to suffer it to go out of his possession. But admitting, *causa argumenti*, that the piano might have been sold or assigned by Guild, the purchaser or assignee could certainly not acquire any greater right than Guild himself had, which at the utmost was merely an equitable right resting in contract to complete the purchase, and not such a vested right of property as could be attached. See cases before cited.

[Omitting unimportant points.]

The fourth ground is, that the plaintiff requested the court to instruct the jury that the time for paying for the piano as stipulated having expired, it could be extended only by a new agreement in writing, and that without an extension the owner had been guilty of laches in suffering the apparent ownership to remain in Guild; and this instruction the court refused. It is argued that the neglect of the owner for two years to enforce the conditions of the contract was calculated to induce the belief that the conditions had been fulfilled and that the owner therefore ought to be estopped from asserting the contrary. But if a neglect for two years was

calculated to have this effect, so would be a neglect for less than two years. So that if the argument were pressed home, it would not be safe for the owner to grant any indulgence after the time of payment had expired. No cases are cited to show that such is the law. We think that in any given case the question whether the conditions of the contract have been waived, or whether the owner shall be estopped from asserting that they have not been waived or performed, is a question of fact for the jury, to be determined under the instruction of the court in view of all the circumstances, and not a pure question of law for the court. We think therefore that the court did not err in refusing the request. *Marston v. Baldwin*, 17 Mass. 606; *Burbank v. Crooker*, 7 Gray, 158; *Bonesteel v. Flack*, 41 Barb. 435.

The last ground is that the court, though requested, refused to instruct the jury that the piano having been sold to Guild on condition, and he having been allowed to assume the apparent ownership, the attaching creditor had a right to consider the piano as Guild's, and it was for the owner to prove that the conditions had not been fulfilled. We think the court erred in refusing this request. This was so held in *Leighton v. Stevens*, 19 Me. 154. That the contract amounts to a conditional sale which becomes absolute on performance of the conditions, see *Currier v. Knapp*, 117 Mass. 324.

The error would be a good ground for a new trial if there were the slightest reason for believing the plaintiff had been injured by it. But the defendant had submitted testimony, which was entirely uncontradicted, that only \$175 of the \$525 which was to be paid for the piano had in fact been paid, so that if the court had given the instruction, it would have been its duty to call attention to the testimony and to the fact that it was uncontradicted, and the result would undoubtedly have been the same. Inasmuch, therefore, as the erroneous instruction did no harm, we do not think a new trial should be granted on account of it. *Edmonson v. Machell*, 2 T. R. 4; *Waters v. Waters*, 26 Md. 53; *Johnson v. Blackman*, 11 Conn. 342; *Evans v. Commercial Mut. Ins. Co.*, 6 R. I. 47.

New trial denied and judgment for defendant on the verdict.

Hunt v. Jones.

HUNT V. JONES.

(12 R. I. 265.)

Contract — validity — lex loci.

An action lies in Rhode Island for breach of contract of sale of goods, the contract being made there and valid there, but the goods to be delivered in New York, where the contract was invalid by the statute of frauds.*

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Z. O. Slocum, for plaintiff.

Charles E. Gorman, for defendant.

DURFEE, C. J. This is *assumpsit* for damages for breach of contract. On trial to the jury, the plaintiff submitted testimony to show that on the 20th of July, 1876, at Providence, in Rhode Island, he sold to the defendant, or entered into an oral agreement with the defendant to sell him, two hundred barrels of Canaan lime at \$1.60 per barrel, to be delivered at the foot of Spring street in the city of New York, the lime then being in process of manufacture in Canaan, Conn., and that subsequently, in pursuance of the contract, the lime was shipped to and delivered at the foot of Spring street in New York city, and notice given of its delivery to the defendant, but that the defendant refused to accept it. The lime was afterward sold at a loss and this action brought to recover damages.

The defendant submitted in evidence a statute of the State of New York, which provides that "every contract for the sale of any goods, chattels or thing in action, for the price of fifty dollars or more, shall be void, unless a note or memorandum of such contract be in writing and be subscribed by the parties to be charged thereby, or unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action, or unless the buyer shall at the time pay some part of the purchase-money."

* See *Bell v. Packard* (69 Me. 105), 31 Am. Rep. 261.

The defendant thereupon requested the court to charge the jury, that as the contract was to be performed in the State of New York, its validity and construction were to be judged by the law of the place of performance, to wit, New York, and that therefore, the contract being void in New York, the plaintiff could not recover. The court refused to charge as requested, but did charge that the plaintiff could recover upon the contract, if otherwise entitled, notwithstanding the contract was not in writing, the contract being valid in Rhode Island, the place where it was made. To this charge the defendant excepted, and now petitions for a new trial, the jury having returned a verdict against him.

The case presents the question whether the validity of a contract, in respect of the form or mode of contracting, depends on the law of the place where it is made or on the law of the place where it is to be performed; or indeed, whether the contract, if it conforms to either law, may not be enforced. No question is made but that the contract in suit is valid in Rhode Island, if resort may be had to the law of Rhode Island to determine its validity.

There is some conflict and confusion of authority on the question, but in the recent decision of *Scudder v. Union National Bank*, 1 Otto, 406, Mr. Justice HUNT, in delivering the unanimous judgment of the Supreme Court of the United States, holds the following language, to wit: "Matters bearing upon the execution, the interpretation, and the *validity* of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." Accordingly, in *Scudder v. Union National Bank* the court held that a bill of exchange drawn in Illinois upon a firm in Missouri, and orally accepted in Illinois, where such an acceptance is valid, was binding upon the drawees, though an acceptance in Missouri would not have been binding unless made in writing.

Where a contract is entered into in one State to be performed in another, there are, it has been said, two *loci contractus*, the *locus celebrati contractus* and the *locus solutionis*; and the law of the former governs the interpretation, nature, and validity of the contract, that of the latter its performance. A contract, however, may be valid by the law of both places, and yet fail practically, if the

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lex fori does not permit its enforcement. *Leroux v. Brown*, 12 C. B. 801.

The rule thus laid down, considered as a rule for personal contracts, though it is at variance with many *dicta* and decisions, is well supported on authority. *Dacosta v. Davis*, 24 N. J. Law, 319; *Cooper v. Waldegrave*, 2 Beav. 282; *Vidal v. Thompson*, 11 Mart. 23; *Aymar v. Sheldon*, 12 Wend. 439; *Chapman v. Robertson*, 6 Pai. 627, 634; *Bain v. Whitehaven, etc., Railway Co.*, 3 H. L. 1; *Van Reimsdyk v. Kane*, 1 Gall. 371; Whart. Confl. of Laws, § 401, p. 676; Story's Confl. of Laws, § 234, *seq.*

There are cases which go further and hold that a contract made in good faith in one State to be performed in another will be upheld if it conforms to the law of either State. In making such contracts, it is argued, the parties may have in view either the law of the State where the contract is made or the law of the State where it is to be performed; and therefore the contract, if made in good faith without any design to evade the law, ought to be allowed and enforced according to its presumable intent, *ut res magis valeat quam pereat*. This rule has been applied especially to stipulations for interest on contracts for the payment of money, and is commended by Professor Parsons as reasonable and just. *Fisher v. Otis*, 3 Chand. 83; *Depau v. Humphreys*, 8 Mart. N. S. 1; *Cromwell v. County of Sac*, 6 Otto, 51; *Bolton v. Street*, 3 Cold. 31; 2 Pars. on Cont. 583; Whart. Confl. of Laws, § 507.

The case at bar, however, involves the validity of the contract in matter of form rather than of substance, and seems to fall more appropriately under the former rule than the latter; but it is immaterial whether the former or the latter is applied, for the contract in suit is valid under either of them.

We think the charge of the court should be sustained and a new trial denied.

Petition dismissed.

CARPENTER V. McLAUGHLIN.

(12 R. I. 270)

Negotiable instruments — indorser before utterance — surety.

One who as surety and before utterance indorses a note payable to another is liable to the payee as a joint maker, although the payee knew him to be a surety.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Elisha C. Morey, for plaintiff.

Charles H. Parkhurst, for defendant.

DURFEE, C. J. This is a petition for the new trial of an action on a negotiable promissory note, dated May 27, 1871, for \$380.10, made by one Michael Phalen, payable four months after date to the order of the plaintiff's firm at bank. The note was a second renewal of a note given for a balance due for materials sold by the plaintiff's firm to Phalen, and the defendant wrote his name upon the back at the time it was made and before it was delivered. The note was not paid at maturity, was not protested, and no notice was given the defendant of its non-payment.

On trial to the jury the defendant offered to prove that the plaintiff knew when he received the note that he, the defendant, was in fact surety for Phalen, and that if he had been notified of the non-payment by Phalen, he could have secured himself, inasmuch as Phalen then had ample property, and that when some five years afterward he was called on for payment Phalen had become insolvent, so that by reason of the delay and the omission of notice he had lost his opportunity of indemnity.

The court ruled that the facts which the plaintiff offered to prove would, if proved, constitute no defense. The jury returned a verdict for the plaintiff for \$121.50. The defendant petitions for a new trial for error in the ruling.

It has been decided in this State that a person who indorses a

*See *Thacher v. Stevens* (46 Conn. 561), 33 Am. Rep. 89.

Carpenter v. McLaughlin.

note payable to another, at the time it is made, is to the payee a joint and several promisor with the maker, although but a surety as between himself and the maker, and that he is not entitled to notice of non-payment by the maker to charge him with liability. *Mathewson v. Sprague*, 1 R. I. 8; *Perkins v. Barstow*, 6 id. 595; *Manuf. & Merchants' Bank v. Follett*, 11 id. 92. It is not intimated in either of the cases above cited that it would make any difference in the rule if it were proved that the payee knew when he received the note that the person so indorsing it was in fact, as between himself and the maker, only a surety; but on the contrary, in *Mathewson v. Sprague*, it is taken for granted that any person who signs his name across the back of a note, the face of which is signed by another, is a surety for the latter. And in our opinion, such a person remains an original promisor to the payee, directly and primarily liable to him, notwithstanding the payee's knowledge of his suretyship, and is not, merely because of such knowledge, entitled to notice of non-payment by his co-promisor. *Bond v. Storrs*, 13 Conn. 412; *Hunt v. Adams*, 5 Mass. 358; 4 Am. Dec. 68; *Union Bank of Weymouth v. Willis*, 8 Metc. 504; *Inkster v. First National Bank of Marshall*, 30 Mich. 143; *Bryant v. Eastman*, 7 Cush. 111.

In the case at bar, however, there was not only no notice given of non-payment by the principal maker, either when it first occurred or subsequently, but there was a delay of several years in making demand for payment on the defendant, whereby the defendant has lost his opportunity of indemnity, and the question is whether this, taken all together, is not such *laches* and delinquency as releases the defendant from his liability.

We think the question must be answered in the negative. It is the business of the surety, being maker as well as surety, to see to it that the note is paid. He cannot lie by until his principal becomes insolvent and then throw the loss upon the creditor. A mere omission to notify the surety of the principal's default, in the absence of any special obligation to notify him, or a mere delay or omission to sue the principal, in the absence of any binding contract to delay or omit to sue him, or any request by the surety to sue him, will not release the surety, even though, in consequence of his reliance upon the diligence of the creditor, he loses his opportunity for indemnification. *Allen v. Brown*, 124 Mass. 77; *United States v. Simpson*, 3 Penn. 437; *Price v. Kirkham*, 3 H. & C. 437.

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The defendant refers to *Carpenter v. King*, 9 Metc. 511, and *Horne v. Bodwell*, 5 Gray, 547. There was in both those cases something more than mere delay or passivity on the part of the creditor. In the first case the surety was informed by the creditor that he had been paid, and relinquished security which the principal had given him in consequence. In the second case the creditor extended the time of payment, without the surety's consent, by a binding agreement with the principal. The cases differ materially from the case at bar. In *Horne v. Bodwell* the court says that a mere omission to sue the principal, in the absence of any binding contract for an extension of credit, will not discharge a surety.

A new trial must be denied and judgment entered for the plaintiff on the verdict.

Petition dismissed.

SHURTLEFF V. MILLARD.

(12 R. I. 272.)

Infancy — repudiation of contract — recovery of money paid.

A minor may recover money voluntarily paid by him on a contract which he has repudiated, and from which he derived no benefit, without deduction for damages for the rescission.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Rollin Mathewson & Nathan W. Littlefield, for plaintiff.

Nicholas Van Slyck & Henry J. Dubois, for defendant.

POTTER, J. The plaintiff, a minor, sues to recover back the sum of forty dollars which he paid the defendant as the percentage required to be paid down for property struck off to him at an auction sale. The defendant contends, first, that it having been a voluntary payment the plaintiff cannot recover it back; second, that if he is entitled to recover it back, the defendant should be allowed to deduct for the expense and trouble which he has been put to by the plaintiff's rescinding the contract. 1 Pars. on Cont., ch. 17, § 5, *322 (6th ed.), 1873, lays down the law on the first point

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broadly as claimed by the defendant. "If an infant advances money on a voidable contract which he afterward rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." He cites no authority. The doctrine so broadly laid down has been overruled by later authorities, and this passage has been condemned in *Robinson v. Weeks*, 56 Me. 102, 104; still the last edition of the text-book takes no notice of the fact.

In one of the earliest cases, *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, Lord MANSFIELD did use language similar to this; but the case was on the point whether a *feme covert* could be barred of her dower by jointure settled on her while under age. Lord HARDWICKE and MANSFIELD and Sir JOHN WILMOT concurred in the decision of that case, but it has been disapproved since. See, in relation to that case, Wilmot's Notes of Opinions, 177, 226; *Milner v. Lord Harewood*, 18 Ves. Jr. 259, 271.

In *Zouch & dimiss. Abbot v. Parsons*, A. D. 1765, 3 Burr. 1794, compare 1 Evans' Decisions, 111, Lord MANSFIELD laid down many of the general rules drawn from the decisions, which have since substantially prevailed, and also, it is believed, first used the expression that the privileges of infancy were given as a shield and not as a sword, which has become a maxim in this branch of the law.

Macpherson, in his work on Infancy, page 484, also cited in *Medbury v. Watrous*, 7 Hill, 110, 114, lays down as law that if a minor contracts for an estate and pays a deposit he cannot, in the absence of fraud, recover it back. But he cites no case. But on page 489 the case of *Wilson v. Kearse*, Peake's Add. Cas. 196, at Nisi Prius, is cited, where Lord KENYON is reported to have once used language similar to that we have quoted from Parsons, that if a minor pays money voluntarily he cannot, if there is no fraud, recover it back. But there is no full nor reliable report of this case.

The case of *Holmes v. Blogg*, 8 Taunt. 508, also in 2 J. B. Moore, 552, was this: The infant had paid a premium for a lease and had occupied the leased premises until he came of age, when he quitted the premises and sued to recover the money back. The court held that having paid money on a valuable consideration, and having partially enjoyed that consideration, he could not recover it back. Chief Justice GIBBS does indeed say that "having paid the money with his own hand" he "cannot recover it back again."

In *Corpe v. Overton*, 10 Bing. 252, the court, holding that the plaintiff might recover back money paid, expressly say that they do not impeach the decision in *Holmes v. Blogg*. In *Corpe v. Overton*, Corpe agreed to form a partnership, and paid down £150, to be forfeited if he failed on coming of age to execute a proper partnership agreement. He rescinded the contract and sued for the money back, having received no advantage whatever from the agreement. In deciding this case, BOSANQUET, J., said that the court used strong expressions in *Holmes v. Blogg*, but we must look not to the expressions alone but to the facts to which they were applied. And see also as to the language used by GIBBS, C. J., in *Holmes v. Blogg*, *Riley v. Mallory*, 33 Conn. 201, 207, and *Robinson v. Weeks*, 56 Me. 102, as to the true ground of decision in that case.

The case of *McCoy v. Huffman*, 8 Cow. 84, A. D. 1827, was a case where an infant had agreed to purchase land and had paid in money and work toward it and sued to recover for that. The court decided, on the authority of *Holmes v. Blogg*, that he could not recover.

In *Medbury v. Watrous*, 7 Hill, 110, A. D. 1845, the plaintiff, a minor, agreed to buy a house and land of the defendant, and had in part payment done work while a minor for the defendant to the value of \$70.20. He never had possession of nor received anything from the house, but on becoming of age sued to recover the value of his work. The case of *M'Coy v. Huffman* was relied on for the defendant, but the court overruled it. And they distinguish it from the case of *Holmes v. Blogg*, and approve of *Corpe v. Overton*, and held that the plaintiff should recover. The case is very ably stated. It was decided when the Supreme Court of New York was the Supreme Court of the whole State, and was composed of Nelson, Beardsley, and Bronson.

Robinson v. Weeks, 56 Me. 102, was a suit to recover back money paid by the plaintiff while a minor for a share of stock in a land and petroleum company. The share had never been transferred to him. He renounced the contract within a fortnight after coming of age. He did not return the receipts for the money, but offered to assign over to the defendant all his interest in the company. The case was tried before the full court. The court held that the plaintiff could not recover without returning the consideration if it was in existence or under his control, but that the receipts were of no

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value except as evidences of payment. "The protection which the law supposes the infant to need is just as much required against the improvidence which has paid out as against that which only promises to pay, and where it can be given without converting the shield into a sword it should be given." Judgment for the plaintiff.

The weight of authority and we think of reason is, that it is no defense that the minor voluntarily paid the money, and that when he has received no benefit from the contract he has a right to recover it back.

Excellent remarks on the classification of minors' contracts are contained in Reeve's Dom. Rel., quoted and approved in *Riley v. Mallory*, 33 Conn. 201; also in *Robinson v. Weeks*, 56 Me. 102, 106. See, also, *Price v. Furman*, 27 Vt. 268.

But it has been argued that if the plaintiff can recover, there should be a deduction made for any expenses which the defendant has been put to.

In *Moses v. Stevens*, 2 Pick. 332, the plaintiff, a boy of eighteen years, agreed to work for the defendant for three years and the defendant was to clothe him, etc., and at the end of the time was to pay him \$120. He worked three months and left without cause of complaint; the defendant subsequently paid the plaintiff \$2, which he took in satisfaction. The plaintiff sued for his work on a *quantum meruit*. The judge charged that he was entitled to what his services were worth to the defendant, and that the defendant was not entitled to deduct any damages for breach of the contract before the plaintiff's coming of age, but that if the defendant was injured by the sudden termination of it without notice, the jury might deduct the amount of the injury. On arguing the exceptions it was contended that the contract, being for the infant's benefit, was binding, and that the doctrine of entirety of contract applied to infants as well as adults. The court held the charge correct, that the jury should give what under all the circumstances the services were worth, making allowance for any injury, and that that was the reasonable and lawful course.

It is claimed that the case of *Moses v. Stevens* was overruled in Massachusetts by the case of *Vent v. Osgood*, 19 Pick. 572. In the last case the plaintiff, a minor, shipped as a seaman for a voyage, and deserted before the end of the voyage, without fault on the part of the master, and sued for his wages. The plaintiff claimed

on *quantum meruit* for his services. The defendant contended that the effect of the minor's avoidance of the contract was prospective only, and that as he had not performed it he could not recover for past services, and *Weeks v. Leighton*, 5 N. H. 343, was cited as authority for applying the doctrine of entirety of contract to a minor as well as to an adult. These were the facts and the points made, and no claim was made for a deduction for damages as was made in *Moses v. Stevens*. The points presented to the court were essentially different. So far from its being overruled in Massachusetts, the doctrine of *Moses v. Stevens* is recognized in *Gaffney v. Hayden*, 110 Mass. 137; s. c., 14 Am. Rep. 580, and in *Breed v. Judd*, 1 Gray, 455. THOMAS, J., in delivering the opinion of the court, says that the only question in the case was the question of the entirety of the contract; and that if a case like *Vent v. Osgood* should again arise, "the grounds on which its decision is based might need reconsideration." See, also, as to this case of *Vent v. Osgood*, remarks in *Medbury v. Watrous*, 7 Hill, 110, 115.

In the case of *Judkins v. Walker*, 17 Me. 18, the court lay down the rule to be in cases of suits for services, to allow for the benefit conferred beyond any injury occasioned, just as if there had been no special contract. "This secures to each what may be proved to be equitable and fair under all the circumstances."

In the case of *Thomas v. Dike*, 11 Vt. 273, the court, by WILLIAMS, C. J., say that they are inclined to adopt the rule of *Moses v. Stevens*, and that in a community where so much work and labor is done by persons under age, it would be unsafe if it was not adopted; and in *Hoxie v. Lincoln*, 25 id. 206, the court, by REDFIELD, C. J., in their opinion quote and approve the rule recognized in *Thomas v. Dike*, that the minor is to recover for his services "what they are reasonably worth, taking into consideration the injury to the other party."

Of the New Hampshire cases cited, *Weeks v. Leighton*, 5 N. H. 343, seems to have been decided on the ground, formerly so generally applied, of entirety of contract and precedent condition. It was there held, the minor could not recover if he left the defendant's service before the expiration of the time. In *Britton v. Turner*, 6 N. H. 481, the court decided against applying this doctrine even in case of an adult, thus impliedly overruling the case of *Weeks v. Leighton*, and allowed the plaintiff to recover on a *quantum meruit*. And in *Lufkin v. Mayall*, 25 N. H. 82, the court

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expressly overrule *Weeks v. Leighton*, and hold, that as under *Britton v. Turner*, an adult is allowed to recover on a *quantum meruit*, after allowing a fair indemnity, it is still more just to apply the rule to the case of a minor plaintiff. The rule thus laid down amounts to no more than this: that he is to recover the reasonable worth of his services to the defendant, which would necessarily include a consideration of any injury done, and as so stated it is reasonable and well supported by the authorities.

On the other side, against allowing any deduction, are *Whitmarsh v. Hall*, 3 Den. 375, and *Derocher v. Continental Mills*, 58 Me. 217; s. c., 4 Am. Rep. 286.

In the latter case the plaintiff had agreed to work in a mill for at least six months and not to leave without giving two weeks' notice. She worked a part of the time and left without notice. The court say the question is whether she is liable to have the damage occasioned by not giving the notice deducted. "To compel the minor to make good the loss occasioned by non-performance of his contract is virtually to enforce the contract." No suit could be maintained against the infant for a breach of it, they say, and to allow a deduction for damages seems to be equivalent to that. And they held that the true rule was that of *Robinson v. Weeks*, 56 Me. 102.

On this we remark that no case has held that damages must be deducted for not giving any notice specially contracted for, or not working out the whole time of the contract. But it is a very different thing to hold that there being no binding contract the plaintiff may recover a reasonable compensation, deducting for any injury done. And the rule of *Robinson v. Weeks* was laid down in a case of money paid out and not of services performed.

While we think therefore that in cases of work and labor done the weight of authority is in favor of the rule as stated by REDFIELD in *Hoxie v. Lincoln*, 25 Vt. 206, there is no such reason for deduction in the case before us.

The present suit is to recover money paid. If the minor had received any consideration or benefit whatever it would come within another class of cases. But he has received neither. And we think the principles on which *Robinson v. Weeks*, 58 Me. 102, and *Medbury v. Watrous*, 7 Hill, 110, were decided apply to it.

The motion for a new trial must therefore be denied.

Exceptions overruled.

ORDWAY V. REMINGTON.

(12 R. I. 319.)

Landlord and tenant — lease — when rent due.

Under a lease for years from a specified day, rent conditioned to be payable quarterly on certain days is not due until after midnight of such days.

ASSUMPSIT. The opinion states the case.

Stephen Essex, for Ordway Bros.

James G. Markland, pro se ipso.

Charles H. Parkhurst, for defendants.

Stephen A. Cooke, Jr., for garnishee.

DURFEE, C. J. The question in these cases arises on the following facts, to wit: One Bainbridge A. Whitcomb was served as garnishee in both cases, being served in the first-mentioned, December 1, 1877, at 3.15 P. M., and in the second, December 3, 1877. The garnishee had no personal estate belonging to the defendants or either of them in his hands when served, unless he was then indebted to the defendant Remington in the sum of \$337.50 for a quarter's rent. The examination of the garnishee shows that he first became the tenant of Remington under a written lease dated August 18, 1874. The lease demises the tenement let "from the first day of September now next ensuing, for and during the full end and term of one year and nine months thence next ensuing." It reserves a yearly rent of \$1,350 "by equal quarter-yearly payments during the said term, the first payment thereof to be made on the first day of December now next ensuing," etc. The tenant held over after his term expired, and continued to occupy the premises until May 31, 1878, without any new agreement. Of course it will be presumed that except in regard to time he held over on the terms of the original demise.

The question is, whether the rent which was payable December 1, 1877, was attachable at 3.15 of the afternoon of that day? This

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question depends on another, to wit, whether the quarter expired on that or the previous day? For if the quarter expired on that day, then the rent, though payable, was not due until after midnight, and until due, the lessor being owner in fee of the premises demised, it was not personal estate, but the lessor dying it would have gone as realty to his heirs. *Glun's case*, 10 Rep. 127; *Rockingham v. Penrice*, 1 P. Wms. 177; *Norris v. Harrison*, 2 Madd. 268; *Duppa v. Mayo*, 1 Wms.' Saund. 282, 286, and note 12; note to *Ex parte Smyth*, 1 Swanst. 342; Taylor on Land. & Ten., § 391; 3 Greenl. Cruise, *283-5.

Whether the quarter expired December 1st or November 30th depends on the construction of the lease. The lease, as we have seen, ran "from the first day of September." If the first day of September is included, the quarter expired November 30; if it is excluded, the quarter expired December 1. The day is to be included or excluded according to the apparent intention of the parties to the lease; but if the demise is *from* a given day and there is nothing else to indicate the intention, then, unless there is some particular reason for holding otherwise, according to the weight of authority we think the given day must be excluded. Taylor on Land. & Ten., § 78; 4 Greenl. Cruise, *59, and note; *Atkins v. Sleeper*, 7 Allen, 487; *Farwell v. Rogers*, 4 Cush. 460; *Bemis v. Leonard*, 118 Mass. 502; s. c., 19 Am. Rep. 470; *Bigelow v. Willson*, 1 Pick. 485; *Styles v. Wardle*, 4 B. & C. 908; *Clayton's case*, 5 Rep. 1; *Webb v. Fairmanner*, 3 M. & W. 473; *Millard v. Willard*, 3 R. I. 42; *Handley v. Cunningham's Trustees*, 12 Bush, 401; *Sheets v. Selden's Lessee*, 2 Wall. 177, 190; *Weeks v. Hull*, 19 Conn. 376; *Blake v. Crowninshield*, 9 N. H. 304.

The case of *Ackland v. Lutley*, 8 A. & E. 879, is precisely in point. There a house was demised *habendum* for twenty-one years from March 25, 1809, paying rent on certain days of which March 25th was one, and it was held that the term under the lease did not expire till the end of March 25, 1830. Lord DENMAN, in delivering judgment, said: "The general understanding is that terms for years last during the whole anniversary of the day from which they are granted. Indeed, if this were otherwise, the last day, on which rent is almost uniformly made payable, would be posterior to the lease."

The affidavit made by the tenant as garnishee indicates that he supposed the quarter ended on the last day of November. Why he

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supposed so does not appear. We do not think we can rightly let his opinion influence our decision.

Our decision is that the garnishee did not have any of the personal estate of the defendants or of either of them in his hands until after the first day of December, 1877, and consequently that he is only liable as garnishee in the case of *Markland v. Remington*. In coming to this conclusion we assume that the lessor was the owner in fee of the premises demised. If he was merely a leaseholder we should have to consider the case in another light.

AUSTIN V. COGGESHALL.

(19 R. I. 329.)

Municipal corporation — feast to strangers — injunction by tax-payer — laches.

A city is not liable for the expense of a public entertainment given to strangers upon the resolution of the common council,* and an injunction to restrain payment therefor will issue at the suit of a tax-payer, brought after the entertainment is given, although he knew of the resolution before the entertainment.

BILL for injunction. The opinion states the facts.

A. & A. D. Payne and William Gilpin, for complainants.

Francis B. Peckham, Jr., city solicitor of the city of Newport, for respondent.

DURFEE, C. J. In the summer of 1878, the *Bellerophon*, under the command of Vice-admiral Inglefield, with two other British ships of war, visited Newport harbor, remaining from August 28 until after September 9. On their arrival the city council of Newport appointed a committee to arrange an entertainment for the officers. Accordingly a ball and banquet were given at the Ocean House, September 9, at a cost of about \$2,950, invitations being extended to some twelve hundred citizens as well as to the officers. It is alleged, by way of apology for the city council, that on a simi-

*To same effect, *Hodges v. City of Buffalo*, 2 Den. 110.

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lar visit in 1875 a similar entertainment was given without objection from anybody, and that the presence of the vessels drew crowds of visitors to the city to the considerable emolument of the citizens. The resolution to give the entertainment was so notorious that it must be presumed to have been known at once to the complainants, who were residents in Newport, and who nevertheless took no legal steps to prevent the entertainment. The answer alleges that the committee of arrangements acted in good faith, believing their action was legal. It also alleges, what appears to have been the fact, that the entertainment was provided on the credit of the city by persons who had no connection with the city government, and who honestly believed that the committee had power to contract for the city. These persons remain unpaid. This suit was commenced September 27, 1878, by certain tax-payers of the city of Newport. The bill prays for an injunction to restrain the defendant, who is the city treasurer of the city of Newport, from paying the cost of the entertainment out of the treasury, it being anticipated that an order for the payment may be given by the city council.

The bill sets forth a clause of the charter of the city of Newport, which declares that nothing in the charter shall be construed "as giving power to vote money for any object, except for the regular ordinary and usual expenses of the city."

The defendant concedes that the city council had no authority to contract or empower the committee to contract for the entertainment in the name of the city, and rests his defense solely on the ground that the complainants have forfeited all claim to equitable relief by their laches in waiting until after the entertainment had been given before bringing the suit. He cites in support of this position the case of *Tash v. Adams*, 10 Cush. 252, in which the Supreme Judicial Court of Massachusetts refused to enjoin the payment of money illegally appropriated for the celebration of the second centennial anniversary of the settlement of a Massachusetts town, because of such laches on the part of those by whom the injunction was asked. "With a full knowledge of the vote of the town and the proceedings of the committee," says Mr. Justice BIGELOW, in delivering judgment, "they, *i. e.*, the petitioners, permitted contracts to be made, and expenditures to be incurred, not only by the committee, but by third parties, who acted in good faith, relying on the credit of the town. They took no measures to enforce their rights until after the celebration had taken place, and

innocent parties had come under liabilities, which they would not have assumed if the petitioners had seasonably sought redress for the impending grievance. To issue an injunction restraining the payment of the bills thus incurred would be manifestly most inequitable;" and see *Fuller v. Melrose*, 1 Allen, 16, in which *Tash v. Adams* is affirmed.

We do not see any material distinction between *Tash v. Adams* and the case at bar, and therefore, if *Tash v. Adams* is good authority, the bill in the case at bar must be dismissed. We do not think it can be followed as authority. The object of this suit is to restrain the defendant as a city treasurer from making an illegal payment out of the treasury. The defendant admits the illegality of the payment, and therefore he virtually admits that the complainants are only seeking to have him enjoined from doing what it is his duty to refrain from doing without injunction. His only objection to the injunction is, that the complainants have forfeited their claim to it by their laches. But toward whom have they been guilty of laches? Not toward the defendant, and not toward the city, for which the defendant acts. The injunction will not hurt the defendant. It will benefit the city. The laches, if laches they can be called, are laches toward certain persons, not parties to the suit, having an illegal claim on the treasury. The defendant is seeking to protect them at the expense of the treasury, when it is his duty to protect the treasury against them. For the court to refuse to enjoin such a dereliction of official duty looks very much like conniving at it. The defense would be more meritorious if the persons in whose behalf it is interposed had any claim on the city for value received. But they have none. The city neither danced at the ball nor feasted at the banquet. It got nothing substantial out of them. If the city's money goes to pay for them, it will go to pay for what the city neither bargained for nor enjoyed. And again, the defense would appeal more forcibly to the consideration of the court if the complainants had taken any part in procuring the entertainment to be given. But they did not. Their only fault is the passive one of having delayed their suit. And in this connection it is to be borne in mind, that the complainants, though they sue alone, do not sue for themselves alone, but for themselves in common with all other Newport tax-payers, and though they may have been guilty of dilatoriness, there are doubtless numerous other tax-payers who by reason of absence, sickness, infancy, or

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imbecility, are entirely innocent in that regard. The defendant represents the entire city, these innocent tax-payers included. It is his duty to defend, not betray, their interests, and the court ought not to countenance a defense which amounts to a betrayal of them.

The case may be considered in still another light. It is of the essence of the defense that the persons who furnished the entertainment acted in good faith, being ignorant that the city was incapable of contracting for it. If they knew the city was incapable of contracting for it, the defense falls to the ground. But was it not their duty to know it? And can the court entertain the supposition that they did not know it? It is well settled that a municipal corporation, when sued directly on a contract which it is incapable of making, cannot be estopped from taking advantage of its incapacity because the party suing has acted on the contract in good faith, supposing it to be legal, for the reason that any person who contracts with such a corporation, which is a creature of public law, is bound at his own peril to know the extent of its capacity. Dill. on Mun. Corp., § 381; *Weismer v. Village of Douglas*, 64 N. Y. 91; s. c., 21 Am. Rep. 586; *Thomas v. City of Richmond*, 12 Wall. 349; *Town of South Ottawa v. Perkins*, 4 Otto, 260; *Chisholm v. City of Montgomery*, 2 Woods, 584; *Bradley v. Ballard*, 55 Ill. 417; s. c., 8 Am. Rep. 656. This rule has been applied in cases where there was much more reason for supposing the contract to be legal than in the case at bar, for in the case at bar the illegality is so evident that the slightest inquiry would have discovered it. Under this rule, if the persons who furnished the entertainment were suing the city of Newport for their pay for it, they could not be heard to urge in support of their claim that they had acted in good faith, being ignorant of the incapacity of the city. But if they could not be permitted to make such a plea for themselves in a suit of their own, upon what principle can the defendant be permitted to make it for their advantage in a suit to which they are not parties? We think it is very clear that he cannot be permitted to do it.

Of course we regret the predicament in which the furnishers of the entertainment will find themselves in consequence of this decision. We trust, however, that their fellow-citizens will not leave them without assistance.

We direct that the injunction be made perpetual.

Perpetual injunction ordered.

PROVIDENCE STEAM ENGINE COMPANY V. PROVIDENCE, ETC.,
STEAMSHIP COMPANY.

(12 R. I. 348.)

Highway — over land filled in below high-water mark — rights of grantees of riparian owner.

A riparian owner platted his land into streets, lots, and squares, one of such streets being below high-water mark; the street was subsequently filled out; but was subsequently closed by the owner of all the adjoining lots; *held*, that he could be compelled to reopen it by the owner of some of the other lots.

BILL to compel removal of obstruction in street. The opinion states the case.

George H. Browne and Charles H. Parkhurst, for complainant.

Benjamin F. Thurston and James M. Ripley, for respondents.

DURFEE, C. J. This is a bill in equity to abate a nuisance or obstruction to an alleged street or right of way at India Point in the city of Providence. In 1811 the land on India Point belonged to the Fox Point Association, so called, being vested in trustees for the association. In 1815 the harbor line in front of it was established. In 1816, the trustees caused a plat to be made embracing the upland and the land below high-water mark out to the harbor line, and dividing the entire tract into lots, squares, streets, and gangways, designating the lots, upward of one hundred and sixty in number, by letters A to K and by numbers 1 to 153. The trustees inscribed on the plat, under their hands, seals, and acknowledgment, the following declaration, to wit:

“Know all men whom it may concern, that all and singular the within numbered lots are sold and conveyed by us, the undersigned, trustees of the Fox Point Association, in manner following, that is to say: All the squares, streets, and gangways are equally appurtenant to each and every of said lots, and each and every the grantees of the same are equally entitled to use and occupy said square, streets, and gangways as such at all times, excepting that the grantees of all and singular the water lots, their heirs and assigns forever,

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shall have the exclusive right to demand and receive wharfage for all the streets and gangways adjoining to their several lots respectively, and each and every the grantees of the water lots, on the west and south sides of said plat, beginning at lot number one and ending at lot number twenty-two, inclusively, their heirs and assigns forever, shall have the sole right to use and occupy the several pieces of land west of the street, adjoining their several lots respectively, for all purposes, excepting that they nor either of them shall not, at any time ever hereafter, have the right to erect any permanent building on said pieces of land or either of them, and the grantee of lot number twenty-two, his heirs and assigns forever, shall have the same right to use and occupy the land south of said lot adjoining said street, subjected to the same restriction as aforesaid."

The plat was afterward recorded, and all the lots designated on it were sold from time to time. The lot designated as lot A, and a portion of the lot designated as lot 56, became the property of the complainant, which continues to own them. Lots 13 to 22, inclusive, became the property of the defendants, who continue to own them.

The bill does not expressly allege that the lots were conveyed under and by reference to the plat, nor does it anywhere appear that such was the fact. We infer, however, from the manner in which the case was submitted to us, that it was supposed we would take it for granted that the conveyances were so made, and accordingly we shall do so.

The alleged street or way here in controversy was among the streets or ways designated on the plat. It was, when platted, below high-water mark, and of course existed at that time only on paper. The land over which it was delineated has since then, and after conveyance, been reclaimed from tide-water by filling out the upland. It lies over or along the front of lots 13 to 22, conveyed to the defendants, said lots being situated at the extremity of India Point, on or near the side of the harbor. The defendants have erected a fence across it, thereby obstructing access to and travel over it. The complainant contends that this is an interruption of its right of way, and has brought this suit to get the fence removed.

The defendants interpose among other defenses the two following, to wit: First, that the street or way was never lawfully created,

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because at the time of its alleged creation the land over which it was laid was flowed by tide-water ; and second, that if it was lawfully created, the part of it lying along or over lots from 13 to 22, inclusive, has become extinguished by unity of title or ownership of these lots. The only question now submitted to us is whether these two defenses, or either of them, is valid.

We think the first defense, to wit, that the way or street was never lawfully created, cannot be maintained ; for though it may be true that the way or street had no actual existence when the conveyances under which it is claimed were made, we think it had nevertheless what may be called a potential or prospective existence, which would become actual whenever the place for it should be filled and incorporated with the upland, and though the conveyances when executed may have been ineffectual to create the way or street, because the site of it was flowed by tide-water, yet we think they were binding by way of estoppel on parties and privies, so that in equity, at least, the said parties and privies could not refuse to allow the way or street as soon as the land designated for it became capable of supporting it. The ground of the estoppel is, that the easements and servitudes indicated by the plat constitute a part of the consideration for which all conveyances referring to the plat are made, and therefore no person, while claiming under the conveyances, can be permitted to repudiate them or to deny that they exist where they are capable of existing.

In coming to this conclusion we make little account of the Harbor Line Act. The ostensible purpose of that act is not to confer any new right, title, or interest on the riparian proprietor, but only to prevent his encroaching too far on the space required for the harbor. It amounts simply to a license to him to fill out to the harbor line, or to an implied declaration that in filling out to it he will commit no encroachment. To hold that it amounts to more would be doing violence to the act, especially in view of the rule that such acts are to be strictly construed, or are to be construed most liberally in favor of the State. See the decision of the Supreme Court of the United States in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

The second defense is, that the way, if ever lawfully created, has become extinct, the title to the several lots over which it is laid having become vested in the same owner. We do not think the defense can avail. The way is appurtenant to other lots than those

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over which it is laid, and among them to the lots belonging to the complainant. The way over the lots belonging to the defendants connects with tide-water, and therefore it cannot be said that the complainant has no interest in the way because the lots over which it is laid all belong to the defendants; for the complainant may want to use it as a way to tide-water, which belongs to everybody.

POTTER, J., concurring. I concur generally in the results at which the majority of the court has arrived.

The facts necessary to the decision of the questions now before us can be stated very briefly.

The trustees of the Fox Point Association, claiming to own certain land and adjoining shore rights and water lots, caused the same to be platted in 1816 in lots for sale and with certain streets laid out thereon. The complainants own lots A and 56 on said plat; the respondents now hold lots 13 to 22 inclusive. The complainants claim that the respondents have without right shut up a certain street upon said plat. It is agreed that said street and all the lots held by the respondents were at the time under water and were not filled up until 1820, and then by the purchasers of said lots and not by said trustees.

Did said street ever have a lawful existence, and if so, has it become extinguished by unity of possession?

It is contended by the respondents that the said platting and conveyance of lots and of any rights in any supposed streets was totally invalid as to that portion of the platted land then under water.

In all questions relating to our shores a very important preliminary consideration is, whether the English common law upon this subject was ever adopted here in its full extent. By the patent of 1643, the laws were to be "conformable to the laws of England so far as the nature and constitution of the place will admit."

By the Code of 1647 it was voted to "receive and be governed by the laws of England, together with the way of administering of them so far as the nature and constitution of this plantation will permit." The laws of Oleron were adopted, and the recorder was required to keep "the general purchases, which are all we can show for our rights to our lands," and the charter which gave a right to exercise authority. It is well known that our ancestors claimed to

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hold their lands by purchase from the native proprietors and not by grant from the crown.

The charter of 1663 used substantially the same language as the patent of 1643. It is very evident that however as a matter of policy, they may have adopted the usual language of charters, they really considered it as a charter of government only, for they had already purchased nearly all the land before, and the remainder they purchased of Ninigret afterward, and did not claim to hold it of the king.

There is a great difference in the character of the shores of the two countries. And as to the rivers, there are but few rivers in England which would be navigable but for act of parliament, and the repair of their banks and their navigation are regulated by statute. So also in many cases as to marshes. See *Ball v. Herbert*, 3 T. R. 253; and as to Rumney Marsh, see 4 Institute, 276, 277.

To apply the common-law doctrine strictly would require us to hold that all the marshes in the State belong to the State; yet from the very first settlement, although flowed by the tide, they have always been recognized as private property, platted and sold as such, taxed as such, and the State has made provision by statute for exempting them from the fence laws, for the very reason that they are overflowed by the tides.

See also as to sedge flats in Connecticut, *Church v. Meeker*, 34 Conn. 421.

Again it is important to inquire into the nature and extent of the right, formerly of the crown, now of the State, in the shores.

The shore in the common law includes only the space between ordinary high and ordinary low-water mark.

The true doctrine seems to be, as the result of the decisions, that the State has the governmental control of the shores and tide-waters for the benefit of the public, in order to protect the public rights of passage or other rights on the shore, and to protect the navigation. Angell on Tide Waters, 27, and cases cited.

It was the policy of the English law, and especially of the feudal system, to consider the king as the original owner of all the lands, etc., in the kingdom. Hence he was the owner of all vacant lands, derelict, etc. All was held of him and escheated to him. So he is spoken of as the owner of the shore.

But the king of England held the shores only as trustee for the public. That he had undertaken to grant away portions of the

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shore as private property, and to exclude the general public from their rights in it, was one of the grievances complained of and attempted to be redressed by Magna Charta. Parliament, according to the theory of the English Constitution, was omnipotent, but the king was not.

The king's right of soil was subject to the public right, and any grantee of the crown held subject to that. *Mayor of Colchester v. Brooke*, 7 Q. B. 339, 374; 9 Jur. 1090.

Hale distinguishes three sorts of rights in ports and shores. First, the "*jus privatum*," or right of property or franchise, which was always subject to second, the "*jus publicum*," or public right of passage and navigation; and third, the "*jus regium*," or governmental right, the right of superintendence and control.

It has been very common to speak of the right of the State in the shores as a fee. This is proper only by analogy. To hold that the State owns the shores in fee in the same sense in which it owns a court-house or a prison, or in which the United States own public lands, or a citizen may own land in fee, would lead to consequences which need only to be considered in order to show that such can never have been the nature of the right. Angell on Tide Waters, 24.

During the revolutionary war and the distressful times which followed it, if the State had owned the fee of this valuable property it could not have escaped a sale. Town treasurers were committed to jail for the non-payment of nearly every State tax that was ordered, and yet no town nor person ever thought of this as a property which the State owned in fee, or could sell to lessen taxation.

To hold that the State holds the fee of the shore in such a sense that it can sell the shores would deprive nearly half of the land in this small State of a large portion of its value derived from bounding on the shore. The city of Newport is the owner of Easton's Beach. For the State to sell the shore would take away almost its whole value.

As there is no statute of limitations against the State, especially so far as public rights are concerned, the State would still own large tracts of filled lands in Providence, Newport, and other towns, unless the State has done some act which would justify the courts in holding it to be private. And even if the private title to land so filled should be held good, the State might still sell out a strip of land at the head of any wharf and so cut off the owner from navi-

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gation. It might sell off the whole shore so as to cut off the present owners from access to the water.

The monstrous injustice that would result if such a doctrine was established as law is enough to show that it ought not to be recognized as law.

And such, I think, is not the meaning of the courts. They have often enough held that the property of the king, and with us of the State, is a trust for the public, a power to control and regulate, to subserve the good of the public, and not a private property. Says Kent, the king in England, and here the State, is trustee for the public; 3 Kent Com. *427; and the Supreme Court of the United States has on several occasions held the same language. *Mayor, etc. of Carlisle v. Graham*, 18 W. R. 318; *Commonwealth v. City of Roxbury*, 9 Gray, 451, 482, 483; *Commonwealth v. Alger*, 7 Cush. 53, 65; *New Orleans v. United States*, 10 Pct. 662, 699, 702; *Simons v. French*, 25 Conn. 346, 352; *Church v. Meeker*, 34 id. 421, 427, 428; *Clement v. Burns*, 43 N. H. 609, 620. In the last case the court says that the doctrine that the title is exclusively in the sovereign has never been fully received in the American courts.

And so in Scotch Law. Bell's Principles, § 642.

The language of the English decisions to the effect that the king holds as trustee for the public is very strong. *Company of Free Fishers v. Gann*, 20 C. B. N. S. 1 (115 Eng. Com. Law, 803); *Gann v. The Free Fishers of Whitstable*, 11 H. L. 192; *Mayor of Colchester v. Brooke*, 7 Q. B. 339. The king's right of soil is "subject to the public right of passage, however acquired, and any grantee of the crown must of course take subject to such right," says Lord DENMAN, in the last cited case, p. 374. *Bundell v. Caterall*, 5 B. & A. 268, 287, 294, 304-9; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 H. L. 418.

The form of an information by the attorney-general of England is given in *Attorney-General v. Richards*, 2 Anst. 603. It alleges that the shore belongs to the king, and ought to be preserved for the public use, and that the king has the right of superintendency for that purpose. It is true that in arguing the case the attorney-general used the usual arguments as to the rights of the crown in the shore.

In *Commonwealth v. City of Roxbury*, 9 Gray, 451, 482, 483, the court recognizes and approves the rule it had before laid down in

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Commonwealth v. Alger, 7 Cush. 53, 65, that the title to the flats was in the king, and "that it was so held by him for public uses. This rule, apparently so well settled and established both in England and in this country, seems to us not to have been shaken or doubted in any recent English case," etc., etc. The king held the seashores as well as the land under the sea; he held the same *publici juris* for the use and benefit of all the subjects for all useful purposes, etc.

In *Smith v. State of Maryland*, 18 How. (U. S.) 71, 74, which was a case of oyster laws, the United States Supreme Court says the right of soil is in the State. "But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, etc. See, also, *Barney v. Keokuk*, 4 Otto, 324; *Martin v. Waddell*, 16 Pet. 367, 410, 423. "When it is said that the sovereign is the owner of the seashore, it is meant that the legal title is in him, not for his exclusive use and profit, but in trust for the common benefit of all his subjects," per THATCHER, J., charging the jury in *Commonwealth v. Wright*; Angell on Tide Waters, 207; 3 Amer. Jurist. 185. And in the great case of *Arnold v. Mundy*, 6 N. J. Law, 1, 71, 77, the court fully discusses the English cases. And it holds that while the title to the common property must be considered as vested in the sovereign, it is to be "held, protected, and regulated for the common benefit." The property indeed, strictly speaking, is vested in the sovereign; but it is vested in him "not for his own use, but for the use of the citizen," etc. This case was for an oyster fishery. See *Bell v. Gough*, 23 N. J. Law, 624. And in *Gough v. Bell*, 22 id. 441, the Supreme Court of New Jersey, by GREEN, C. J., lays down the same doctrine that the king held as trustee, and that his grants were subject to all public rights.

The language of many of the decisions can be reconciled by holding that while the State does not own the shore in fee, properly speaking, and therefore cannot sell the shore to be held as private property, and so cut off the riparian owner from the water, it has the complete regulation and control of it for public purposes.

In several cases very strong language has been used, to the effect that there can be no private riparian right in tide-flowed land, and that if a railroad cuts off the riparian owner entirely from the water, he has no remedy and no claim to compensation. Most of

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these decisions, and those going the greatest length have been made in States peculiarly situated as to railroad corporations. See *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522; *Stevens v. Paterson & Newark R. R. Co.*, 20 N. J. Eq. 123; 34 N. J. L. 532, 544, 566; s. c., 3 Am. Rep. 269. To the same effect is *Tomlin v. Dubuque, Bellevue & Miss. R. R. Co.*, 32 Iowa, 106; s. c., 7 Am. Rep. 176, which relies on the last two cases.

Some of these cases have been severely criticised. Cooley Const. Lim. 544, note 1, remarks of them: "So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation; for even those courts which hold the fee in the soil under navigable waters to be in the State admit valuable riparian rights in the adjacent proprietor." And see, also, 11 Alb. L. J. 19.

And I think the extreme rights claimed for the State by these decisions are in conflict with the general course of decision in other States, and with many cases in New Jersey itself. See, besides those before referred to, *Stockham v. Browning*, 18 N. J. Eq. 390, where it was held that the riparian owner could not maintain ejectment, but that, nevertheless, he had an inchoate right in the shore which equity would protect.

Before the decisions in New Jersey in the several cases of *Gough v. Bell*, it had been the common notion in New Jersey that through the grant from the king to the duke of York and from him to the first proprietors, the land under tide-water and under Raritan Bay had been conveyed, and through them to the riparian owners, and this fact is necessary to the proper understanding of the cases and opinions. See 3 Kent's Com., *416. And in *Bell v. Gough*, 23 N. J. L. 624, 655, ELMER, J., commenting on the argument advanced by counsel, that in *Martin v. Waddell*, 16 Pet. 367, the United States Supreme Court had decided that the soil below high-water mark was exclusively in the sovereign, and that the riparian owner had no right in it, said that this was not true. The plaintiff in that case did not claim as riparian owner, but under the proprietor's grant he claimed the land itself under Raritan bay for an oyster fishery, and the question was whether the Jersey proprietors ever had any title to convey. The United States court held that by their charter they had only the sovereign rights of the crown, which could not be transferred as private property.

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When the case of *Gough v. Bell*, 22 N. J. L. 441, came before the Court of Errors as *Bell v. Gough*, 23 N. J. L. 624, in June, 1852, the decision was unanimously confirmed, and some of the judges expressed very strongly the view I have here taken as to the riparian right to wharf out and occupy, and that it was a sort of customary law there. 23 N. J. L., 678, 685, 688, 695, 702.

In Massachusetts, and Sullivan says in New Plymouth, the ordinance of 1640 extended the riparian rights over the flats. The principles of this ordinance were adopted in New Hampshire, though the ordinance never extended thither. Sullivan on Land Titles in Massachusetts, 284.

But it is probable that this ordinance only recognized and validated an existing usage. Sullivan, Land Titles, 285, says: "From the first settlement of the Colony of Massachusetts, that government practiced upon the principles of this provision." And Angell, Tide Waters, 225, says, that although the ordinance was afterward annulled, the usage continued, and now has the force of common law, quoting the words of the Supreme Judicial Court in *Storer v. Freeman*, 6 Mass. 434, 438. And that this common law extended to the seashore as well as to coves, etc., was settled in subsequent cases there cited, although the words of the ordinance did not plainly extend to the seashore. And see the cases cited by Angell, Tide Waters, 234, i. e., *Commonwealth v. Charlestown*, 1 Pick. 180; 11 Am. Dec. 161; *Commonwealth v. Pierce*, 2 Dane Abridg. 696, recognizing the common practice to wharf out to low-water mark, or further if it was not injurious to navigation.

In this State it has always been understood that the riparian owner has the right to wharf or embank against his land, and so make land from tide-water, and this without license, provided he does not interfere with the navigation. It was so stated by Mr. Angell in the first edition of his work on Tide Waters, in 1826, repeated in the subsequent editions, and this portion of his work has never been adversely criticised. In very few instances was there any legislating by the State, and notwithstanding the common practice of wharfing and filling, it is believed there has never been an instance of the State interfering to prevent it. There has, indeed, been a good deal of legislation regulating the Long Wharf in Newport.

The State never undertook to regulate this right till 1815, and then did not profess to grant a right, but only to prevent encroach-

ment to save the harbor; and it is noticeable here that the business was first taken up in town meeting, and a committee of five of the most respectable citizens appointed, men old enough to be well acquainted with the usages of our ancestors and the shore rights claimed by them, and who died before most of the present members of the bar were born. And this committee reported that in their opinion, "the rights of individuals have been extended beyond the original intention of the proprietors when the lots were first laid out, as appears by plats," etc. And the town proceeded to vote in town meeting that the plat reported by the committee be "established as containing the boundary lines of the harbor aforesaid," and for greater security that application be made to the general assembly.

Up to 1815, we had no Harbor Line Act, and for a large portion of the shore have none now. But no Rhode Islander ever thought he was obliged to petition the general assembly for leave to build a wharf on his own land, and the records of our general assembly and courts will, we think, be searched in vain for any attempt to interfere with this privilege so generally used.

From the very first settlement of the State our people have claimed and held property in tide-waters. And as I have said, the State regulated the fencing of marsh land in June, 1834; the marsh lands of the Woonasquetucket river in October, 1804; and again recognized the ownership in 1861. Pub. Laws, ch. 362. And the Providence purchasers exercised complete control over their thatch lots.

In 1773, the Providence purchasers granted to the Baptists several acres in the cove, where the Worcester freight depot now is. They granted to the State a jail lot, covered by salt water (minutes of Judge STAPLES). If the State owned the tide-flowed land in fee, there was no need of this; nor was there any need, when they sold the jail lot to the city, of obtaining a release from the proprietors. See Acts and Resolves of General Assembly of October, 1825, p. 63; October, 1828, p. 70; January, 1838, p. 68, Bridgham and Carrington, committee; June, 1838, p. 4, George Curtis's committee. And the committee of the proprietors of the grand purchase to convey the lot to the State were James Fenner, Zachariah Allen, and Joseph L. Tillinghast. Some of these men, probably, knew something about the old usages of Rhode Island.

The State itself has sold large tracts of land bounding on the sea, confiscated in the revolution, where, probably, half the value con-

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sisted in its sea frontage. It has received the money and put it into the public treasury, and save the people from so much taxation, and the owners have ever since been taxed for this additional value.

And the fact that from the first settlement of the State, down to 1815, no act was ever passed even to limit and restrain this ancient practice, is significant. The Harbor Line Act of 1815 does not profess to grant any rights, but only to prevent encroachments by wharves beyond the established line. The Amendatory Act of January, 1837, was of the same character. The Act of October, 1841, forbade the erection of any wharves in the cove above the bridge, except under the direction of the city authorities.

The right to wharf out or reclaim is a valuable right even before its exercise. It constitutes a part of the value and sometimes nearly the whole value of the upland. In *Martin v. Waddell*, 16 Pet. 367, 414, TANEY, C. J., says: "The men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the New World, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment and unable to take a shell fish from its bottom, or fasten there a stake or even bathe in its waters, without becoming a trespasser upon the rights of another."

In *Bowman's Devises & Burnley v. Wathen*, 2 McLean, 376, 382, which was a case on the Ohio river, McLEAN, J., after holding that the English law as to the navigableness of streams has no application in this country, and does not depend on the ebb and flow of the tide, goes on to say: "It is enough to know that the riparian right on the Ohio river extends to the water, and that no supervening right over any part of this space can be exercised or maintained without the consent of the proprietor. He has the right of fishery, of ferry, and every other right which is properly appurtenant to the soil. And he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The State cannot, either directly or indirectly, divest him of any one of these rights, except by a constitutional exercise of the power to appropriate private property for public purposes."

In *McManus v. Carmichael*, 3 Iowa, 1, an action of trespass was

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brought against the defendant for taking sand from the shore against the plaintiff's land. After a very full discussion the court held it was no trespass, but expressly says that it does not mean to say that the riparian owner does not possess peculiar rights, and that he might not have a remedy by action of the case or by indictment.

In *Yates v. Milwaukee*, 10 Wall. 497, 504, the United States Supreme Court, by MILLER, J., held that whether the ownership extends beyond the land or not, this riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested the owner can only be deprived in accordance with established law, and if necessary that it should be taken for the public good upon due compensation. And the court refers to *Railroad Co. v. Schurmeir*, 7 Wall. 272, and *Dutton v. Strong*, 1 Black, 23.

In *Webber v. Harbor Commissioners*, 18 Wall. 57, the court says it recognizes the correctness of the rule as laid down in *Yates v. Milwaukee*, 10 Wall. 497. In that case the legislature had granted to the city the right to wharf out at the ends of all the streets, and the defendant, who had erected a wharf, was not a riparian owner. And the court makes a distinction as to statutes of limitation as concerns the State between lands it holds as private proprietor and lands it holds as sovereign in trust for the public.

In Wisconsin, in *Chapman v. Oshkosh & Miss. R. R. Co.*, 33 Wis. 629, where the riparian front was cut off by a railroad, the court, by COLE, J., consider the decisions in *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522, and in *Tomlin v. Dubuque, Bellevue & Miss. R. R. Co.*, 32 Iowa, 106, unsound; and in *Delaplaine v. The C. & N. W. R. R. Co.*, 42 Wis. 214, they approve and follow their former decision, holding that the riparian owner on a navigable river has rights therein differing in kind and degree from the rights of the public. He has the right of access to and from his land, and to all the facilities which the location of the land gives him, and this although the water's edge is the boundary of his title. And they quote and approve the language of the English decision in *Lyon v. Fishmongers' Company*, L. R., 1 App. Cas. 662. And in *Diedrich v. N. W. U. R. R. Co.*, 42 Wis. 248, 264; s. c., 24 Am. Rep. 399, the court approve the decision in *Chapman v. Oshkosh & Miss. R. R. Co.*

In *Lorman v. Benson*, 8 Mich. 18, it is held that the riparian owner is entitled to every right consistent with the public easement; and in *Rice v. Ruddiman*, 10 Mich. 125, it was held that the riparian owner's title extended into the lake as far as it was susceptible of private use. For this the United States had got an increased price for the land. And it is queried whether the State could cut him off from the water.

In *Barron v. Mayor & City Council of Baltimore*, 2 Am. Jur. 203, it was held that the owner had the right of access to his land by water, and that this was property.

Some of these cases arose on the large rivers and lakes of the West. But the principle must be the same. There is no use of referring to many of the cases where it has been held that no private person has a right to do any thing to injure or take away the access of the riparian owner to his land. In *Rose v. Groves*, 5 M. & G. 613, the plaintiff, who had a house on the bank of a navigable river, recovered for the injury done him by the defendant in placing timber in his front. They have, however, an important bearing as recognizing that a riparian owner has rights, from the very fact of his being such owner, which are valuable, and if so, constitute a species of property of which no one can legally deprive him, subject, of course, to the public rights of navigation, etc., and to be regulated by the legislature so as to protect them.

By the Thames Conservancy Act of A. D. 1857, the conservators of the Thames might license any riparian owner to make any dock, basin, or embankment in front of his land into *the body of the river*, with a proviso that it should not abridge or take away any right, franchise, etc., etc., to which any owner of lands on the banks of the river is now by law entitled. In *Lyon v. Fishmongers' Company*, the defendant under license was embanking in such a way as to cut off a portion of the access which the plaintiff had before enjoyed to his wharf, and he prayed for an injunction. The defendant did not claim a right to interfere with the plaintiff's proper frontage on the river; but from the peculiar shape of the shore, he had enjoyed a double frontage, west as well as south. MALINS, V. C., granted an injunction. L. R., 10 Ch. App. 681, n. The case was appealed, and the lords justices reversed his decision. L. R., 10 Ch. App. 679, 687. The justices base their decision on the ground that there was no violation of any private right of the riparian owner distinct from the public right of navigation, and that

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they could find no authority for holding that on tidal rivers the riparian owner had any rights or easements similar to those which belonged to an owner above the flow of the tide. The House of Lords, L. R., 1 App. Cas. 662, reversed the decision of the lords justices, and opinions of considerable length were delivered by CAIRNS, lord chancellor, and CHELMSFORD and SELBORNE, ex-chancellors. They all hold most explicitly that the right of the riparian owner does not depend merely on the fact that he suffers a particular damage from a public nuisance, but that he has, as in case of a highway, certain rights distinct from those of the general public, which are valuable and cannot be infringed. It is not a right held in common with the rest of the public, for the other members of the public have no access to or from the river at that particular place. It is a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages or restrained by injunction. See, also, *Attorney-General v. Conservators of the Thames*, 1 Hem. & M. 1, where the same law is laid down by Page-Wood, V. C.

In *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23, it was held that the riparian owner on navigable water has the right of access from the front of his lot, and to erect wharves, etc., subject to regulation by the legislature; that these rights are property; and while they must be enjoyed in subjection to the rights of the public, the owner cannot be deprived of them.

So, in our sister State of Connecticut, it was laid down by Judge SWIFT, that while the sea and navigable waters are common for certain purposes, the owners of the bank have a right to the soil covered with water as far as they can occupy, that is, to the channel. It was subsequently explained that this does not mean that the riparian owners are seised, but only that they have a right to occupy, and that it is properly termed a franchise. The usage to wharf out is recognized as an immemorial usage, which makes a common law. It exclusively belongs to the riparian owner, and no one has any right to do any thing to his injury in front of his land. 1 Swift's System, ch. 22, p. 341; *East Haven v. Hemingway*, 7 Conn. 186; *Chapman v. Kimball*, 9 id. 38; *Nichols v. Lewis*, 15 id. 137; *Simons v. French*, 25 id. 346, 352.

The right to wharf out has also been generally recognized in the other States. See the cases and reasoning in a very able opinion in *Clement v. Burns*, 43 N. H. 609, 617; and Mr. Justice DILLON,

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in *Northwestern Union Packet Co. v. Atlee*, 2 Dill. 479, 485, says: "Structures of the character just named (that is, wharves and landing places) connected with the shore, when not erected in violation of legislative regulations, when they do not obstruct the paramount right of navigation, and are not nuisances in fact, have the sanction of long usage in this country, and under the qualifications suggested may be lawfully erected; but the right it is said must be understood as terminating at the point of navigability."

And in the Scotch law it is held, while the riparian owner's absolute right extends only to high water, he has a modified property below it, and that no one can interfere between him and the shore. *Bell's Dict. and Digest*.

That it may sometimes be a nice question as to when the right of the riparian owner is to be held to conflict with the rights of the public, is no sound reason for denying the right. In the language of BEST, J., in *Blundell v. Catterall*, 5 B. & A. 268, 277, "The law in these, as in all other cases, limits and balances opposing rights, that they may be so enjoyed as that the exercise of one is not injurious to the other."

That where land is reclaimed from the tide-waters it may be held, at least to a certain extent, as private property, cannot well be doubted. *Bell v. Gough*, 23 N. J. L. 624.

The next question, and a very important one, is whether the person having the right to wharf out or to fill up can convey this right separate from the upland. If the street can be held as a street by estoppel, there is no reason whatever why the same doctrine should not be applied to the lots then under water. The street is laid out for the lots and not the lots for the street. Unless the lots then under water were to be filled, the street would have been of little or no value. The right has been recognized in many States without any reference to the principle of estoppel.

The original proprietors of Providence conveyed thatch rights to persons not owners of the upland, as we have stated. In Massachusetts, under their Colony Ordinance of 1640, which as I have before said was probably only designed to recognize and limit an existing usage, the riparian owner had a qualified right to low-water mark, provided it was not more than one hundred rods, and a man might sell these flats separately. *Adams v. Frothingham*, 3 Mass. 352; 3 Am. Dec. 151; *Valentine v. Piper*, 22 Pick. 85; *Mayhew v. Norton*, 17 id. 357. See, also, *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155;

Knight v. Wilder, 2 Cush. 199; *Dunlap v. Stetson*, 4 Mason, 349; *Bowman's Devisees & Burnley v. Wathen*, 2 McLean, 376, 384, 389; *Simons v. French*, 25 Conn. 346, 352; *Deering v. Long Wharf*, 25 Me. 51; *Chapman v. Kimball*, 9 Conn. 38; *Nichols v. Lewis*, 15 id. 137. So in *East Haven v. Hemingway*, 7 id. 186, 202, the right to wharf out is recognized as of immemorial usage, and it is held that this right of occupation is properly a franchise. So also in *Simons v. French*, 25 Conn. 346, 352.

As to the doctrine of dedication, it is pretty difficult to understand how any thing can be dedicated which cannot be used for the purpose intended. Here the land was under water. But if the water lots were validly conveyed, the right in their owners to fill up the street seems to follow; and the owners of those lots, as well as all the owners of lots on the plat, might well be held to be estopped from denying it to be a highway.

As to the effect of unity of possession, the argument of the respondents that the purpose of this street was to provide a way for lots 13 to 22 would, it seems to me, from their location on the plat, be entitled to great force but for the language of the instrument attached to the plat, which declares expressly that all the squares, streets, and easements are attached to each lot.

Decree accordingly.

LEE V. UNION RAILROAD COMPANY.

(12 R. I. 383.)

Negligence — fright of horse by snow heaped in highway — action.

A was injured by a horse driven by B, on a highway, and frightened by the overturn of a sleigh by a heap of snow and ice wrongfully made on the highway by C. *Held*, that A could maintain an action against C therefor.*

TRESPASS on the case. The facts are stated in the opinion.

Francis W. Miner, for defendant, cited *Marble v. City of Worcester*, 4 Gray, 395, 397; *Mangan v. Atterton*, L. R., 1 Exch. 239.

Rollin Mathewson, contra.

* See *Bing v. City of Cohoes* (77 N. Y. 63), 38 Am. Rep. 571.

Lee v. Union Railroad Company.

DURFEE, C. J. The plaintiff, who was knocked down and run over by a horse and sleigh while walking on the sidewalk of one of the public streets of the city of Providence, brings this action against the defendant corporation to recover damages for the injuries which he sustained. The declaration alleges that the defendant corporation wrongfully and unlawfully made and deposited and suffered to remain in said street large heaps of snow and ice, which obstructed the street and rendered it unsafe for travel, and that a team which was being driven down the street came in contact with the accumulation, whereby and by reason whereof the sleigh was overthrown, and the horse becoming frightened broke away from his driver and ran furiously against the plaintiff, causing the injuries of which he complains. The declaration alleges that the plaintiff was in the exercise of due care and that his injuries were caused wholly by the obstruction of the street. The defendant demurs to the declaration, and contends that the action cannot be maintained because the accumulation of snow and ice was not the proximate cause of the injury.

We think the demurrer must be overruled. Every thing which happened resulted naturally from the overturning of the sleigh by the embankment of snow and ice, without the intervention of any new responsible cause. In such cases the original cause is in law the proximate cause. See, in addition to the authorities cited for the plaintiff, Cooley on Torts, 68-77. The case of *McDonald v. Snelling*, 14 Allen, 290, is closely in point. There it was held that if one negligently frightens the horse of another, which thereupon runs away and comes into collision with a second horse and injures him, the owner of the second horse can recover of the person whose negligence caused the first to take fright and run away. See, also, *Clark v. Lebanon*, 63 Me. 393.

The defendant objects that the declaration does not allege that the driver of the horse and sleigh was using due care. We do not think the allegation was necessary. It is enough that the declaration alleges that the plaintiff's injury was caused by the nuisance created by the defendant corporation. *May v. Inhabitants of Princeton*, 11 Metc. 442.

Demurrer overruled.

BALDWIN V. BARNBY.

(13 R. L. 302.)

Sunday—action for tort on.

A, carefully driving on Sunday on a highway in Massachusetts, was injured by the reckless driving of B; *held*, that A could maintain an action therefor against B in Rhode Island, without showing that he was travelling for necessity or charity.*

ACTION of damages. The opinion states the case. The defendant had judgment below.

Ballou & French, for plaintiff.

Bosworth & Champlin, for defendant.

DURFEE, C. J. This action is trespass to recover damages for an injury resulting from a collision on a highway in Swansea, Massachusetts. On the trial to the jury the plaintiff submitted testimony to show that the collision occurred September 10, 1876, being a Sunday, at about 7.30 o'clock, P. M.; that the road where the collision occurred was eighteen feet wide; that he and the defendant were travelling in opposite directions, each driving a horse and buggy or wagon; that he saw the defendant approaching and turned out to the right as far as he could and stopped; that he called to the defendant, but that the defendant drove rapidly along the middle of the road, without turning aside, and ran into his buggy, upsetting it, throwing him out, and doing the buggy considerable injury. The plaintiff, having submitted this testimony, rested; and the defendant thereupon moved for a nonsuit, on the ground that it appeared from the testimony submitted, that at the time of the collision the plaintiff was travelling on Sunday, in violation of law. The court granted the nonsuit, being of the opinion that the plaintiff could not prove his case without proving his own criminality. The plaintiff excepted, and petitions for a new trial.

We think the plaintiff is entitled to a new trial. The report of

* To same effect, *Schmid v. Humphrey* (49 Iowa, 632), 30 Am. Rep. 414.

much more than half of the road, and stops. He shouts a every thing in his power to prevent the impending collision the approaching traveller, paying no heed, drives straight runs violently into him. Now can it be said that the traveller contributed to the collision, which he so persistent to avoid, by travelling as he did, because if he had not been ling the collision would not have occurred? Is not the co rather an incident or concomitant of his travelling than its c We think so. And if we add that the collision occurred on day, and that the injured traveller was violating the Sabba simply add a new tint to the moral complexion of the casualt we reflect no new light on its causes. The collision would occurred just the same, if instead of being engaged in vio the law, he had been going to or returning from church. He mitted no fault in reference to the impending collision, and t fore no fault which, in contemplation of law, contributed t injury which he received.

We are conscious that the distinctions which we have indic are not free from obscurity, and that they are such that one easily go astray in reasoning upon them; but nevertheless we t they are real and apprehensible, clearly felt, even when they not be clearly expressed, and that they are as valid in law as are in common sense. Of course it is immaterial, so long as distinctions are not confounded, whether we call the act of tra ling a cause or a condition of the injury. If, however, we call cause, then we have to distinguish between causes, and we hav hold that the act of travelling, though it is a cause, is not the mediate or proximate cause, which alone entails legal responsibil and which alone, when contributed by the plaintiff, defeats his rig of action, but is only a remote cause which will not be regarded the law. In *Jones v. Inhabitants of Andover*, previously cited, Supreme Judicial Court of Massachusetts seems to have recogniz the distinctions which we have been endeavoring to elucidate, b it also seems either to have regarded them as immaterial or to ha overlooked their materiality. Chief Justice BIGELOW, in givin the opinion in that case, said: "It is true that no direct unlawf act of omission or commission by the plaintiff, done at the momen when the accident happened, and tending immediately to produ it, is offered to be shown in evidence. But it is also true that the plaintiff had not been engaged in the doing of an unlawful ac

the accident would not have happened, and the negligence of the defendants in omitting to keep their road in proper repair would not have contributed to produce an injury to the plaintiff." Now, with deference to the learned court, we think the act of travelling, though unlawful, could not properly defeat the action on the ground that it was a contributory cause, unless it was one of the immediate causes of the injury. And in other cases involving the doctrine of contributory cause, this has been recognized by that court. *Steele v. Burkhardt*, 104 Mass. 59; *Spofford v. Harlow*, 3 Allen, 176; *McGrath v. Merwin*, 112 Mass. 467; s. c., 17 Am. Rep. 119.

There is a question which may hereafter arise, if the plaintiff was in point of fact travelling in violation of law when the collision occurred, namely, whether the defendant is entitled to prove it to defeat the action. The question is not now before us, but it is so closely allied to the question which is before us that we do not think it improper to consider it.

It will be seen at once that the proof is irrelevant, and therefore inadmissible, unless the law affords no redress to any person who is injured while transgressing it. But this is not so. A defendant who is sued in tort cannot justify the tort, whether willful or negligent, by proving that the plaintiff, when injured, was transgressing the law, so long as the tort and the transgression are independent or disconnected, except in time and place, in their relation to each other. *Welch v. Wesson*, 6 Gray, 505; *Steele v. Burkhardt*, 104 Mass. 59; *Alger v. City of Lowell*, 3 Allen, 402, 405; *Dimes v. Petley*, 15 Q. B. 276; *Hopkins v. Crombie*, 4 N. H. 520; *Bigelow v. Reed*, 51 Me. 325; *Baker v. Portland*, 58 id. 199; s. c., 4 Am. Rep. 274; *Hoffman v. Union Ferry Co.*, 68 N. Y. 385.

The view which we have taken of the principal question in this case, though it is at variance with Massachusetts decisions, is supported by many well considered decisions of other courts of the highest authority. *Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Towboat Co.*, 23 How. 209; *Mahney v. Cook*, 26 Penn. St. 342; *Davies v. Mann*, 10 M. & W. 546; *Norris v. Litchfield*, 35 N. H. 271; *Baker v. City of Portland*, 58 Me. 199; s. c., 4 Am. Rep. 274; *Kerwhaker v. C. C. & C. R. R. Co.*, 3 Ohio St. 172, 195; *Sutton v. Town of Wauwatosa*, 29 Wis. 21. Among these cases we invite attention particularly to the last named, in which the question is discussed by Chief Justice DIXON with eminent

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acumen. The subject is also treated with characteristic candor and clearness by Judge COOLEY in his recent valuable work on Torts, § 157. He expresses the opinion that the weight of authority is now in favor of the conclusion which we have adopted. See, also, Whart. on Neg., §§ 330, 381 *a*, 405, 995.

We remark in conclusion that the law which the plaintiff is supposed to have been violating when he was injured is a statute of the Commonwealth of Massachusetts. The case has been argued as if we could take judicial cognizance of it. Of course we cannot do so. We have, however, treated the case as if we could, for it was for the advantage of the defendant for us to do so, and in the view which we have taken it could not do the plaintiff any harm. We may add that if the collision had occurred in Rhode Island our decision would not have been materially different either in reasoning or in result.

Petition granted.

GLAVIN V. RHODE ISLAND HOSPITAL.

(12 R. I. 411.)

Negligence — action against public hospital.

One who sustains injury at a public hospital from unskillful surgical treatment by an unpaid attending surgeon may maintain an action against the hospital therefor, although the hospital is a public charity, supported by trust funds, and the plaintiff paid nothing but a small amount for board and attendance.

ACTION of damages for malpractice. The opinion states the case. The defendant had judgment below.

Charles E. Gorman, for plaintiff.

Charles Hart and Charles Bradley, for defendant.

DURFEE, C. J. This is an action on the case to recover damages for unskillful and negligent surgical treatment. The declaration sets forth that the plaintiff, having received injury on his hand and fingers for which he was in need of surgical and medical treatment and care, gave himself into the charge of the defendant corporation,

who were owners of a large hospital where they were in the habit of receiving persons needing such treatment and care, and of treating and caring for them for hire; and that in consideration of being so received and treated with skill and care, he promised to pay the defendant corporation a reasonable compensation therefor, and that the defendant corporation, in consideration thereof, received him and promised to supply him with such surgical and medical treatment, skill, and attention as were necessary for the care and cure of his injuries. The declaration also sets forth that the corporation, its officers, agents, and servants, regardless of its and their duty, neglected properly to care for the plaintiff and his injuries, or to supply such medical and surgical treatment as was needed for their care and cure; but on the contrary conducted so carelessly, improperly, and unskillfully, that his hand and fingers by reason thereof became ulcerated and gangrenous, and likewise his arm, so that his life was endangered and his arm had to be amputated at or near the shoulder, etc. The declaration also contains counts charging the defendant corporation with a neglect of duty in other ways, and especially in that, regardless of the obligation incumbent on it, it neglected to provide careful, competent and skillful officers, agents, and servants to care for, attend to, and treat him and his injuries.

On the trial to the jury the plaintiff submitted testimony to show that on the 3d of October, 1873, he had two fingers of his right hand accidentally sawed off by a circular saw in a lumber yard where he was employed; that he was immediately taken to the hospital, where he was received by the superintendent, and committed to the care of the surgical interne, who etherized him and undertook to dress his wound; that a profuse hemorrhage occurred, being occasioned, as the plaintiff claims, by the negligence or unskillfulness of the interne; that the interne, after repeatedly trying in vain to arrest the hemorrhage by ligating the arteries, applied a tourniquet to the plaintiff's arm so tightly as to stop circulation, and kept it applied for nearly seventeen hours, before the arrival of a surgeon who was skillful enough to ligate the arteries; that the plaintiff, in consequence, suffered excruciating pain, his arm being enormously swollen, and that afterward his arm mortified so that he had to have it amputated, and did have it amputated, after leaving the hospital, just below the shoulder joint.

Glavin v. Rhode Island Hospital.

The plaintiff also submitted testimony to show that his injury was such, especially in view of the hemorrhage, that some one of the experienced surgeons, attendant on the hospital, should have been immediately summoned; but that in fact, no one of them was sent for until after nearly nine hours, and no one came until after nearly seventeen hours, though there were four, subject to call, residing and having their offices within a mile of the hospital. Further testimony was introduced by the plaintiff showing the treatment which he received both while he was in the hospital and after he left; showing the degree of care which was used in selecting the interne, and showing the charter of the corporation and the rules and regulations in force in 1873. It appeared that the plaintiff was taken from the hospital by his friends against the advice of the surgeon, and that when he left, October 22, 1873, a bill for board and attendance at \$8 per week, amounting to \$21.71, was presented to him in behalf of the defendant corporation, which was subsequently paid.

For the defendant corporation testimony was introduced to explain the management of the hospital generally, as well as the circumstances of the case of the plaintiff, and to show that there was no want of reasonable care, skill and diligence on the part of the defendant corporation. Testimony was also introduced to show that the hospital was administered as a charity; that its income was derived mainly from its endowments and from voluntary contributions; that the physicians and surgeons attendant on the hospital, and the medical and surgical internes, gave their services without compensation, except that the internes, who were required to be constantly in attendance, had their board and lodging in the hospital, and that the bill which was rendered to the plaintiff was designed only to cover board, washing, warmth, and the services of nurses and ward tenders.

After the introduction of the testimony and the argument of the case to the jury, the court instructed the jury that no testimony had been submitted which entitled the plaintiff to a verdict for damages, and directed the jury to return a verdict for the defendant corporation. The ground of the instruction was, that the defendant corporation being the dispenser of a public charity, and being dependent for its support, in a great measure, on voluntary grants and contributions, was, for reasons of public policy, exempt from liability for any negligence or unskillfulness on

the part of its trustees, agents, servants, physicians, or surgeons, or of its medical or surgical internes; and that if any patient in the hospital suffered injury in consequence of any such negligence or unskillfulness, his remedy, if any he had, was to prosecute the person or persons who were directly chargeable with the negligence or unskillfulness, and not to bring his action against the defendant corporation.

The plaintiff contends that this instruction was erroneous, and that he was entitled to recover, *first*, because the defendant corporation delivered him over to an incompetent and unskillful interne, in selecting whom for his place the corporation did not exercise proper care; *second*, because the interne, acting within the scope of his appointment, unskillfully and negligently cared for him; *third*, because the interne caused his hemorrhage by his unskillfulness and negligence, and *fourth*, because the plaintiff being in a critical condition, it was the duty of the interne, under one of the rules of the hospital, to send immediately for some one of the attendant surgeons, and the duty of the corporation, under its charter, having established the rule, to put it in execution.

The court, in giving its charge to the jury, was guided by *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; s. c., 21 Am. Rep. 529. In that case a hospital patient sued the corporation for unskillful surgical treatment by a house pupil, a functionary similar to a surgical interne. There was no evidence of any want of care in selecting the house pupil, and the court held that without such evidence the action could not be maintained, and at the same time strongly intimated an opinion that it could not be maintained even with such evidence, for the reason that the corporation could not be held to have agreed to do more than furnish hospital accommodations, which the plaintiff had had, and also for the further reason that any judgment recovered against the corporation could only be satisfied out of funds which being dedicated to the charity could not be lawfully used to pay it.

The Supreme Judicial Court of Massachusetts, in the case above cited, referred to *Holliday v. St. Leonard*, 11 C. B. (N. S.) 192, decided by the Court of Common Bench, in 1861, as authority for the point that the corporation was not liable to be sued for the tort of the house pupil without proof of negligence in selecting him. The doctrine enounced in *Holliday v. St. Leonard* is that a corporate or quasi corporate board or body having a public trust or duty

to discharge gratuitously, is not liable for the torts of its or employees if it is personally without fault. The plain our attention to cases in which *Holliday v. St. Leonard* h qualified or impugned. *Mersey Docks v. Gibbs*, 11 H. L. R., 1 H. L. 93; *Forman v. Mayor of Canterbury*, L. R., 6 Q. B. 599; *Coe v. Wise*, 1 id. 711; 5 B. & S. 440, 458. These cas that a board or body having work to do for the public grati are liable for the torts of their servants or employees the sa private business corporation, provided they have funds or receipt of an income out of which a judgment against them satisfied. *Winch v. Conservators of the Thames*, L. R., 7 C. 9 id. 378. The authority of *McDonald v. Massachusetts Hospital*, in so far as it rests upon *Holliday v. St. Leonard*, ously impaired by these cases, and the question arises whe might not have been better decided on the other grounds sug in the opinion of the court.

The other grounds suggested were two. The first was th corporation could not be presumed to have agreed to do mor furnish hospital accommodations, and these the plaintiff ha It is quite conceivable that a corporation might not agree more than furnish hospital accommodations, leaving the pati find his own physican or surgeon. In such a case the corpo would plainly not be liable for the torts of the physicians o geons, for in such a case they would not be its servants; would not have assumed any responsibility in their selection. that is not this case. Here the physicians or surgeons are se by the corporation or the trustees. But does it follow from that they are the servants of the corporation? We think no A out of charity employs a physician to attend B, his sick bor, the physician does not become A's servant, and A, if been duly careful in selecting him, will not be answerable to his malpractice. The reason is that A does not undertake to B through the agency of the physician, but only to procure the services of the physician. The relation of master and s is not established between A and the physician. And so there such relation between the corporation and the physicians and geons who give their services at the hospital. It is true the ration has power to dismiss them, but it has this power not b they are its servants, but because of its control of the hospital their services are rendered. They would not recognize the ri

the corporation, while retaining them, to direct them in their treatment of patients.

But though the relation of master and servant cannot be said to exist between the hospital and the physicians and surgeons attendant on it, the hospital does nevertheless assume a responsibility in that it uses its own judgment, or that of its trustees, in selecting them, and impliedly therefore undertakes to exercise reasonable care to get such as are skillful and trustworthy in their professions. A patient has a right to rely on the exercise of such care, and consequently if, through the neglect of the hospital to exercise it, he receives an injury, he is entitled to look to the hospital for indemnity, unless the hospital enjoys some extraordinary exemption from liability.

In the case at bar, however, the injury was not received from a physician or surgeon, but from a surgical interne, and it may be that a surgical interne stands on a different footing. There are some cases of minor importance in which the internes are allowed to act as physicians and surgeons, and in such cases I think that their relation to the corporation does not differ from that of a visiting physician or surgeon. But the internes act in still another capacity. The corporation undertakes to furnish physicians and surgeons for all kinds of cases, including the most critical. It has a regular staff of physicians and surgeons. But inasmuch as these are not, like the internes, constantly in attendance at the hospital, they must frequently be sent for. The corporation undertakes to send for them, and of course it must do it through an agent. The internes are the persons appointed to perform this duty for it. A rule of the hospital prescribes that in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring an immediate operation, the interne shall send for the surgeon of the day, and, if he cannot be found, for one of the other surgeons. Here then we have the relation of principal and agent, or master and servant. If the interne neglects to call the surgeon in the class of cases designated, his neglect is the neglect of the corporation. Now the plaintiff contends that his injury was such that under the rule a surgeon should have been immediately sent for, and that the interne's neglect to do it cost him his arm. He also contends that the corporation did not use proper care in selecting the interne, who was incompetent for his position, and thereby he suffered the injury complained of. He contends

that he was entitled to recover on both these grounds, an evidence was sufficient to establish them, we think that entitled to recover on both grounds, unless the hospital enjoys peculiar immunity.

This brings us to the important question whether the hospital does enjoy any peculiar exemption from liability. The claim that it enjoys such an exemption rests upon two grounds: to the ground of public policy, and on the ground that the hospital had no funds except such as are exclusively dedicated to charitable uses for which it was established, and which therefore cannot be applied to indemnify a patient who has been injured by the negligence or malpractice of a physician or surgeon, medical or surgical interne.

The first ground is the ground on which the plaintiff was sued. The argument is that hospitals, like the Rhode Island Hospital, are a public benefit; but if they are liable for the negligence of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, they will be discouraged from voluntarily contributing to their education and support, and therefore public policy demands that they shall be exempted from liability. In our opinion the argument will not bear examination. The public has a doubtless interest in the maintenance of a great public charity, such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the legislature.

The second ground is one of the grounds suggested in *McDonald v. Massachusetts General Hospital*. No authority was cited in that case except *Holliday v. St. Leonard*, previously mentioned. The defendants, however, have referred us to *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507, which is very much in point. Heriot's Hospital was an eleemosynary foundation created by will for the benefit of fatherless boys. The suit was in behalf of a boy who was alleged to have been illegally refused the benefit. The question was whether the action would lie against the trustees.

as such for damages for the refusal. The House of Lords held that the plaintiff had no right to indemnity out of the trust funds. Lord COTTENHAM was of the opinion that to give damages out of the trust fund would be to divert it from its proper purpose. Lord CAMPBELL thought it would be contrary to reason, justice, and common sense to sanction the suit. "Damages are to be paid," he said, "from the pocket of the wrong-doer, not from a trust fund." Lord BROUGHAM strongly expressed the same opinion.

The authority relied on to support the decision was a decision of the House of Lords in *Duncan v. Findlater*, 6 Cl. & Fin. 894. There the action was against trustees appointed under a public road act, to charge them in their *quasi* corporate capacity for an injury occasioned by the negligence of the men in making the road, and the House of Lords held that the action was not maintainable. The case resembles *Holliday v. St. Leonard*, and like it, in the light of the later decisions, it has no value as a precedent for any case where there are funds which can be applied to the payment of damages.

We have previously, in this opinion, cited the cases which limit the authority of *Holliday v. St. Leonard*. It may help us to consider the leading case more in detail. The leading case is *Mersey Docks v. Gibbs*, 11 H. L. 686, decided in the House of Lords in 1865. The action was against a *quasi* corporate board charged with the duty of keeping certain docks in order, and authorized in consideration thereof to collect tolls and dock rates. The board had no interest in the rates and tolls, being bound to expend them on the docks or in the payment of a debt incurred in building them. A vessel belonging to the plaintiff was injured in entering the docks in consequence of a neglect to keep them fit for navigation. The House of Lords decided that the action for the injury would lie against the board, the plaintiff being entitled to indemnity out of the public fund. The case was decided with great deliberation, the judges being summoned in. Mr. Justice BLACKBURN, after advisement, delivered the unanimous opinion of all the judges who heard the case. The opinion was that such corporation, though acting without reward, are in their very nature substitutions, on a large scale, for individual enterprise, and that in the absence of any thing in the statutes which create them showing a contrary intent, it must be held that their liability was intended to be, to the extent of their corporate funds, the same as that of individual

owners of similar works. He also remarked that if the interpretation of the statute is that it casts a duty on the corporation not only to construct the works, but also to use reasonable care in their construction and in their maintenance for use, it is nothing illogical in holding that those who are injured by neglect of the duty may maintain an action against the corporation and be indemnified out of the funds vested in it by the statute. The case of *Duncan v. Findlater* was cited by Mr. Justice BLACKBURN in his opinion, and the language there used by Lord COTTENHAM, which was chiefly relied on as authority for the decision in *Feoffees of Heriot's Hospital v. Ross*, was expressly disapproved. It is remarkable, however, that the case of *Feoffees of Heriot's Hospital v. Ross*, though cited by counsel, does not seem to have attracted the attention of either Mr. Justice BLACKBURN or the three learned lords who delivered concurring opinions.

The language used by Lord COTTENHAM in *Duncan v. Findlater* was criticised by Lord WESTBURY more pointedly even than by Mr. Justice BLACKBURN. He said in effect that he supposed Lord COTTENHAM regarded the funds of statutable boards as being of the nature of trust property, and had the idea that trust property should be protected in equity from seizure and sale on execution for the torts of the trustees. He expressed the opinion that this was erroneous. "It is much more reasonable," he says, "in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice in seeing that the beneficiary will always have his right of compensation and his title to relief against the individual corporators who wrongfully used the name of the corporation."

In all the English cases decided since the decision of *Docks v. Gibbs*, which we have seen, the cases of *Duncan v. Findlater*, and *Holliday v. St. Leonard*, as authority for the broader doctrines declared in them, are uniformly regarded as authoritative and ruled.

In view of these later decisions the question here is, whether a charitable corporation, like the Rhode Island Hospital, which holds its property for the charity, is more highly privileged than a corporation created for public purposes, which holds its property for such purposes; whether, in fact, because it holds its property for the charity, it is relieved from all responsibility for the torts or negligences of its officers, trustees, agents, or servants.

We have come to the conclusion, after much consideration, that it is not. We understand the doctrine of the cases which we have just been considering to be this; that where there is duty, there there is, *prima facie* at least, liability for its neglect; and that when a corporation or *quasi* corporation is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation or *quasi* corporation to exercise such care and skill; and that the fact that it acts gratuitously, and has no property of its own in which it is beneficially interested, will not exempt it from liability for any neglect of the duty, if it has funds, or the capacity of acquiring funds, for the purposes of its creation, which can be applied to the satisfaction of any judgment for damages recovered against it. We also understand that the doctrine is that the corporate funds can be applied, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them. We do not understand, however, that the corporate property is all equally applicable. For instance, in the case of *Mersey Docks v. Gibbs*, it was not decided that the docks themselves could be resorted to, but only the unapplied funds which the board then had or might afterward acquire. So in the case at bar; it may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages. But however that may be, we understand that the defendant corporation is in the receipt of funds which are applicable generally to the uses of the hospital, and following the decision in *Mersey Docks v. Gibbs*, we think a judgment in tort for damages against the corporation can be paid out of them. Indeed, we cannot see why these funds are not as applicable to the payment of damages for tort as to the payment of counsel for defending an action for such damages. Both payments are to be regarded as incident to the administration of the trust.

POTTER, J., concurring. I concur in granting a new trial but for reasons somewhat different from those given by the other members of the court.

The plaintiff sues the defendant for maltreatment by one of its surgeons, *i. e.*, the interne, while he was at the hospital. He alleges that the defendant corporation undertook to treat him by its agents

and servants, and treated him so negligently and unskillfully he lost his arm, etc., etc.

It is contended on the part of the defendant that it used care in the selection of the surgeon, which is all it is bound that it undertook to provide shelter and nursing and free attendance, and no more; that it did not undertake to perform the duties of a surgeon, but only to place the plaintiff in charge of a surgeon; and that on grounds of public policy, being a charitable corporation, dispensing without charge a public charity, and no other than trust funds for the purpose of that charity, it cannot be held liable for the negligence of its unpaid servants.

The arguments of counsel have been very able, but the searches have only discovered one case nearly in point, *McDonnell v. Massachusetts Hospital*, 120 Mass. 432 ; s. c., 21 Am. Rep. 52.

We are therefore left to settle the case on general grounds.

And it seems to me that all that is requisite for the decision is the application of a few simple and generally acknowledged principles.

That a private person, acting without compensation, is in some cases liable for negligence, is well settled. In *Shiells v. Black*, 1 H. Bl. 128, Lord LOUGHBOROUGH declared that "if a man gratuitously undertakes to do a thing to the best of his skill when his situation or profession is such as to imply skill, an omission of skill is imputable to him as gross negligence;" and this holding, although perhaps not necessary to the decision of that particular case, has been sustained by all the decisions and text writers. So Judge STORY, *Bailments*, §§ 180, 182, *a*, lays down the law that where the man's situation or employment does not necessarily imply any particular skill, he is liable only for bad faith or gross negligence, if acting gratuitously; if his situation or employment implies ordinary skill or knowledge adequate to the undertaking, he is responsible for any injury resulting from the want of exercising that skill or knowledge.

And Dr. Wharton, after stating the cases, says that this is only the doctrine of the common law, but was the doctrine of old Roman law, and is that of the jurists of France and Germany of the present day. Whart. on Neg. (2d ed.), §§ 504, 640, 730; also, 1 Smith Lead. Cas. *294, *335, *337, *341.

The only difference between the case of a corporation and a private citizen is, that while a private person may do the service

self, the corporation cannot itself give the medicine or the treatment, but must do it through an agent. If a person should volunteer to pay for a physician selected by the sick person himself, there could of course be no liability. If the same person should send a physician gratuitously to a sick person, provided the physician was of reputable standing, there would be no good ground for holding the sender liable for the doctor's negligence; but suppose he should send a quack or an ignoramus, by whose treatment the patient should be seriously injured, it might well be questioned whether he ought to be free from liability unless the patient knew the character of the person sent and the risk he was incurring.

But to go a step farther; suppose any private person, from charity, undertook to furnish physicians gratuitously, and so advertised to the public, would it not be his duty to send persons of competent education and skill? And would it not be negligence in him not to do so?

The cases are numerous where a person who holds out to the public his readiness to perform the duties resulting from any particular trade or employment, and who, instead of doing the particular work himself, sends a servant to do it, is held liable for the incompetence of his servant, or even for the carelessness of a competent servant. It is true that in most of these cases last mentioned, the master who is held liable not only pays the servant, but he expects pay from the person for whom the work is to be done.

In the present case the services were gratuitous to the person injured, but the agent is indirectly compensated by the corporation; i. e., by the opportunities for acquiring skill, experience, reputation, and subsequent practice in the profession.

But a corporation can act in no other way than by agents. It is the corporation acting through them. On no other principle can corporations be held liable at all. Wharton on Negligence, §§ 279, 280. If this is sound we come back to the ground before stated. It is the same case as if the corporation were itself a physician and offered to perform the service gratuitously, in which case it would be held answerable for gross negligence.

If an individual, holding himself out as possessing particular skill in a particular branch of business, is so liable, even if his services are offered gratuitously, can there be any other rule for a corporation? There is no principle of law, and no analogy to justify any distinction.

The fact that the corporation is a charitable one can give greater exemption from liability than a charitably disposed individual could claim.

It is in no sense a public corporation. It has no governing powers, no civil authority whatever. It may be, as an organization of charity, and as concentrating the efforts of individuals, a great public benefit. So railroads, banks, may be of public use, but still are private corporations.

But it is said that it is a *quasi* public corporation, because its object is public charity. So may be a college; and so may a church corporation which opens its doors and seats freely the people. Still they are in law private corporations and treated as such; a mere aggregation of individuals and of individual efforts for the more effectual carrying out of some particular purpose; generally it is true, with an exemption from private liability, but with private liability so far as their general property, *i. e.*, property not under special trusts, is concerned. This exemption from private liability is indeed one of the principal reasons for resorting to incorporation. But to hold such corporations exempted from corporate liability is a very different thing.

And this remark, that it is a private corporation and in no sense a public one, it may be well to keep in remembrance while examining some of the English cases to which we have been referred.

In the case of *Duncan v. Findlater*, 6 Cl. & Fin. 894, the defendants were trustees under a local act of parliament to build a canal road. By the language of the act the funds raised were to be applied to certain purposes and "to no other purpose whatever," in reading the opinions, it is evident that the language of the majority had considerable weight, although the lords do make remarks of very general character. Here the object was a public one, and it was in the exercise of one of the ordinary powers of government.

In the case of *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507, the head-note lays down the rule broadly, that charity trusts' funds are not liable for breach of trust of the trustees. But looking at the case we find that certain property had been given to the city of Edinburgh for the relief and education of fatherless boys, and the complaint was that the trustees had refused to admit a certain boy. This was the only question.

In this and the preceding case some very strong language was used by Lord COTTENHAM and others as to the non-liability

such corporations. And this language is strongly criticised by Lord WESTBURY in *Mersey Docks v. Gibbs*, 11 H. L. 686, 732. Query, whether in the case of Heriot's Hospital the managers ought not to have been personally liable.

In the case of *Mersey Docks v. Gibbs*, 11 H. L. 686; L. R. 1 H. L. 93, the docks corporation was created by acts of parliament for a public purpose, and was held liable for the damages claimed. By § 134 of 6 Geo. IV, ch. 187, the masters, i. e., harbor masters and dock masters, were specially authorized to pay out of the rates levied under the act any damages occasioned by the negligence or misconduct of their officers and servants. The provision of itself might sustain the decision.

But in all these cases the discussion takes a wide range, and although profitable for instruction, it is rather difficult to discover what principles, if any, are settled by them. They are well reviewed in *Levingston v. Guardians of the Lurgan Union*, I. R., 2 C. L. 202.

But it may be further contended that the corporation in this case does not offer to furnish the medical treatment directly, but only to furnish the surgeons and the accommodations for the patients; that this is all it engages to do; and this is the best light in which the case of the hospital can be placed.

But it seems to me that in this case, as in others, it is the corporation itself which treats the patient through its officers. They do not furnish physicians, but a physician, a regular officer or employee of the corporation; they hold him out to the public as their physician, create a confidence in him, and thus in a measure warrant his competency.

In giving the opinion of the judges at the request of the lords, in *Mersey Docks v. Gibbs*, 11 H. L. 686, 707, BLACKBURN, J., takes the ground that as these corporations are merely substitutes for private enterprise, there is no reason why the substituted person should not be liable, and this opinion is approved by the lord chancellor in delivering the judgment of the lords. 11 H. L. 728.

If there had been several persons acting separately, each employing a portion of his property in furnishing a physician gratuitously, each would have been liable for negligence in the cases we have stated. If each one takes the same amount of property and they join together and form a corporation to carry out the same object,

why should the property be exempted in one case more than in the other? The corporation is in fact a mere agency for effecting the same purpose more conveniently and economically.

Railroad corporations, like others, can only act through agents. The trustees or directors exercise the powers of the corporation in appointing these agents. Generally such corporations carry passengers for pay. But sometimes by agreement, for certain purposes, and sometimes by favoritism, passengers are carried free. In the first case there may be said to be a consideration or something equivalent to pay. But if the passenger is carried for no consideration whatever the rule is the same.

It might as well be argued in the case of such free passengers, and even in the case of paying passengers, that the corporation merely agrees to furnish proper cars and proper officers to run them, and that if it does this it is not liable.

But these corporations are held liable by the policy of the law, as common carriers, and because it is considered absolutely necessary for public safety. The lives and property of the passengers are intrusted to them and are under their control. And so here; the limbs and lives of patients are intrusted to the corporation, and although it acts gratuitously, it should for public safety be held to the strictest responsibility.

The railroad company is bound to exercise proper care and is held liable for want of it. And there seems to be a stronger reason for the application of the principle in the present case, because, although it may be the habit of railroad officials to give their friends free passages, that is not the business for which the corporation was formed; whereas in the present case gratuitous treatment is one of the most important objects, almost the principal object for which the defendant corporation was created.

It is enough that confidence is tendered and accepted. That is a sufficient consideration; and the fact that the service is rendered gratuitously is immaterial. "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it," said GRIER, J., citing *Coggs v. Bernard*, and 1 Smith Lead. Cas. *95; *Philadelphia & Reading Railroad v. Derby*, 14 How. 468, 485; Whart. on Neg., §§ 640, 641. The remarks of the last cited author in section 437 and the authorities there cited apply. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly

be governed, he is bound to do it in such a manner that those who act upon the faith of it shall not suffer from his negligence; and this even if there was in the beginning no consideration for the promise.

The only safe ground therefore is to hold that the corporation is itself present, acting in and through its officer selected for the particular purpose, and is therefore liable to the same extent he would be himself; and in this case we have already stated the rule which governs the liability.

Is it not better and safer for the court to follow out the analogies of the law, and then if the legislature is of opinion that public policy demands a limitation of this liability, it is in its power to interfere and grant an entire or a partial exemption.

Petition granted.

CASSIDY V. ANGELL.

(19 R. L. 447.)

Negligence — contributory — defect of proof of absence of.

Where one was found fatally injured in an excavation in a highway, and there was no proof of the circumstances of his death, the jury may consider his habits as to temperance and caution, and his acquaintance with the locality, upon the question whether he had used reasonable care. (See note, p. 691.)

ACTION of negligence, by administrator. The intestate was found fatally injured in a pit left unguarded in a public highway. There was no witness of the accident. The deceased knew of and was accustomed to pass the pit. The opinion states other facts. The defendant had judgment below.

James M. Ripley, Albert R. Greene and Charles Bradley, for plaintiff.

James C. Collins, for defendant.

FORTER, J. In this case, after the plaintiff had put in his evidence, he was nonsuited on the ground that he had produced no evidence to show that the deceased was in the exercise of ordinary

care. And the defendant claims that this should be shown by affirmative evidence.

In the present case the accident was in the night. The injured did not live to tell his story to a jury.

We think the case should have been submitted to a jury. It is ordinarily a certain degree of presumption that a person of ordinary intelligence will not purposely expose himself to danger. On the other hand, the habits of the person as to temperance, heedlessness, etc., may be considered, and so also that he lived near the danger must have known of the danger. If the plaintiff's own case shows that he brought the injury on himself by his own carelessness, it may be nonsuited; but if it does not he should not be nonsuited but the question is for the jury. So it has been held that the exercise of due care may be inferred from the absence of all appearance of fault on the part of the plaintiff. And as Dr. Wharton observes the conflict of decisions is more apparent than real. When a plaintiff shows negligence on the part of the defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that the plaintiff was guilty of negligence. Whart. on Negl. §§ 423, 425, 426; *Bonnell v. Del., Lack. and W. R. R. Co.*, 39 N. L. 189; *Johnson v. Hudson River R. R. Co.*, 5 Duer, 21; 6 id. 6; and see the remarks of DENIO, J., on the burden of proof in the same case, 20 N. Y. 65, 70. In New York it is settled that a jury may infer that the plaintiff was using ordinary care from the absence of contrary indications.* Shearm. & Redf. on Negl., §§ 44, approving the language of DENIO, J., that the negligence of the plaintiff is matter of defense unless it can be inferred from the plaintiff's own evidence. And the same doctrine is laid down by the Supreme Court of the United States. *Railroad Company v. Glendon*, 15 Wall. 401.

Petition granted.

NOTE BY THE REPORTER. — See *Prideaux v. City of Mineral Point*, 43 Wis. 513; s. c., 11 Am. Rep. 558, and note, 563. It seems to be thought that late New York cases qualify the doctrine of the *Johnson* case, cited in the principal opinion. See 20 Alb. L. J. 359. The two cases referred to are *Reynolds v. N. Y. Cent., etc., R. Co.*, 58 N. Y. 248, and *Cordill v. Same Defendant*, 75 id. 330. In the former case, at the close of the evidence a motion for a nonsuit was denied. The court said:

"We think this judgment must be reversed, on the ground that there was no evidence in the case upon which the jury was authorized to find the absence of negligence on the part of the plaintiff."

* See these cases collected and discussed in 18 Alb. L. Jour. pp. 144, 164, 184, 204.

of the plaintiff's intestate which contributed to his death. The absence of negligence on the part of the person injured must be found by the jury in order to justify a recovery against a defendant who is sued for damages for a personal injury caused by negligence. It belongs to the definition of the cause of action that the injury must have been occasioned solely by the negligence of the defendant, and either by direct proof given by the plaintiff, or from the circumstances attending the injury, the jury must be authorized to find affirmatively that the person injured was free from fault which contributed to the accident, or the action is not maintained. If this element is wanting in the case the court may commit or set aside a verdict for the plaintiff. This rule is now too firmly settled in this State to be disturbed. *Johnson v. The Hudson River R. R. Co.*, 30 N. Y. 66, *Wells v. The Same*, 34 id. 430, *Davis v. N. Y. C. and H. R. R. Co.*, 47 id. 400.

"The plaintiff's intestate was shown to be a bright, intelligent boy, thirteen years of age, who, the summer before his death, had worked on a farm, and received thirteen dollars a month and his board for his services, and was at the time of the injury living at home and attending school. He was perfectly conversant with the railroad and the manner of running the trains, and crossed it several times each day on going to and returning from school. At noon of the day when he was killed he started from the school-house, which was about two hundred feet north of the railroad track, and passed into the highway, which crossed the track of the railroad at nearly right-angles, and turned southerly, going toward his home, which was south of the railroad. About this time a freight train crossed the highway, going east on the south track of the railroad, and the regular passenger train at about the same time came from the east on the north track. The boy was last seen alive in the highway going toward the crossing, and about one hundred feet distant from it. He was found dead in the cattle-guard between the tracks, and the evidence leaves no doubt that he was struck and killed by the engine of the passenger train. The railroad track at this point is straight for about half a mile each way, and it was proved that the deceased, at a point ten feet north of the track, if in the beaten path of the highway, could have seen the engine of the passenger train when 750 feet distant, and when within three feet of the track the approaching train could be seen for half a mile. The day was fair, with but little wind, and the evidence on the part of the plaintiff tended to show that the bell was not rung, and that no signal of the approach of the train was given. There was sufficient proof to go to the jury of the defendant's negligence, but we think that the proof did not warrant the jury in finding that there was no negligence on the part of the deceased.

"It is suggested that the smoke from the freight train may have obscured his vision and prevented his seeing the passenger train, or that as there was some snow and ice on the ground he may have slipped in attempting to cross the track, or to escape from the train approaching, or that having stepped upon the track to allow the freight train to pass, his attention was diverted for a moment, when he was struck by the train from the opposite direction. But these are mere conjectures, without any basis in the evidence to support them. Doubtless the jury might infer that the deceased was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death, but that men are careless and subject themselves thereby to injury, is the common experience of mankind, and when injured no presumption exists in the absence of proof that they were exercising due care at the time."

In the latter case the court cite the former, and say: "When there is no evidence tending to establish such care, it is the duty of the court to nonsuit." "When a person has been killed at a railroad crossing, and there are no witnesses of the accident, the circumstances must be such as to show that the deceased exercised proper care for his own safety. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited. The presumption that every person will take care of himself from regard to his own life and safety cannot take the place of proof, because human experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety.

"There were four persons who witnessed this accident, and have been called to testify to what they saw. Let us first consider this case with their evidence eliminated, and then see how it stands. The accident happened on the southerly track of the railroad, between one and two o'clock in the day-time, while the intestate was attempting to cross the track

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on foot. He lived near the track, and knew where it was, and all its surroundings. He was not incumbered with any hindrances, was a man of mature age and judgment, possessed of all his faculties. There was no wind or storm to interfere with sighting. He knew the track was used for trains going east, and that danger was mainly apprehended from the west, and while he may have known that no particular train was due at that time, he must have known that trains are frequently behind the schedule. He had no reason to expect any signal or warning of the approach of a train because such signals were not customary at that point. This was the emigrant train of twenty-one cars moving at a rapid rate of speed, and necessarily making much noise. There were two tracks further north than the one upon which the intestate was killed, and there was a train at the same time going west upon the most northerly track. That was a train of eleven cars moving slowly and making less noise than the train from the west. There were obstructions west of the crossing intercepting to a considerable extent the sight in that direction; yet, according to the evidence most favorable to the plaintiff, it was possible for him to see at least forty feet westerly before getting upon the track. Facts which are beyond dispute seem to me to show that the deceased could have seen much further in that direction. While these obstacles may have imposed upon the railroad company the duty of greater caution in running its trains at that point, they also imposed upon the deceased the duty of care to avoid danger in crossing the track. Now, suppose, under these circumstances, that the deceased had been found killed there, no human eye having witnessed the accident, could the plaintiff have recovered? We think not. There would have been no evidence from which a jury could justly have inferred that he used such care to avoid the danger as the law requires. A jury could not have indulged in the speculation that he looked both ways and that "the train stole down upon him" unawares and killed him. No person could say that the exercise of proper vigilance on his part would not have saved his life.

"But if we look at the evidence of the eye witnesses of the accident, the case is still more favorable for the plaintiff. She called one, the engineer of the emigrant train. He testified that just before he saw the deceased he looked northerly toward the gravel train coming west, and when he turned his eyes in the direction his train was moving, he saw the deceased two steps from the south rail of the track, and saw him step twice, the second time taking him just over that rail, and then he gave a signal, and the engine struck him. The deceased was looking eastwardly away from the approaching train, and when the witness first saw him was one hundred and fifty feet distant. This evidence conclusively shows the carelessness of the deceased. The deceased could have seen the train at least as soon as the witness saw him. If he had then looked and stood still he would have been safe. He would certainly have been safe if he had stepped backward instead of forward. There was nothing to prevent him from arresting his progress to the fatal spot, and the consequence of his death should not be visited upon the defendant whose carelessness, if any, was certainly greater than his.

"The three other witnesses who were called by the defendant make the defense stronger. They testified that they saw the deceased come upon the track, and stand there facing the east for some time before he was struck. They may be mistaken as to the length of time he stood there, and other particulars, but they concur with the plaintiff's witness in the fact, that he was heedlessly there, in a place of danger, looking away from the direction from which danger was to be apprehended. It does not help the plaintiff to maintain that these witnesses were not to be believed, because their evidence could be stricken out without materially weakening the defense.

"Without therefore examining other errors alleged to have been committed upon the trial, for the reason stated, the plaintiff should have been nonsuited."

While there are expressions in both these cases tending to support the inference above mentioned, we do not think there was any intention to overrule the *Johnson* case. In both the late cases there was explicit proof of contributory negligence, or the circumstances were such that it ought reasonably to have been inferred.

In the most recent case, in that court, *Riceman v. Havemeyer*, February, 1881, an action for the death of plaintiff's intestate by falling into a tank of defendant's, it appeared that his duties called him to pass over a passage-way from which he fell; that it was easy to pass without harm where he went; that for four years men had passed there, one of them a hundred times of a night without accident; that intestate had been to and fro over the

same way more or less for two days before the accident, five times shortly before it, that a fellow-servant went over safely just ahead of him; that the way was well lighted and there was no obstruction or impediment save a gutter which had blocks to aid over it; and that he had been especially charged to be careful and not to fall into the tank. *Held*, that there was no evidence of want of contributory negligence on the part of the intestate. To show that it was possible for the fall to have happened without negligence is not to give ground that it thus happened. The rule that either by direct proof or from circumstances attending the injury, the jury must be authorized to find affirmatively that the person injured was free from fault helping to the mischance, or the action cannot be maintained, must be applied. *Citing Reynolds v. New York Central R. R. Co.*, 58 N. Y. 258.

In *Raibroad Co. v. Whitacre*, 35 Ohio St. 627, it was held that "if the plaintiff's evidence shows an injury by defendant's negligence, and does not raise an implication that his own contributed, the burden of proving such contributory negligence as will defeat a recovery rests upon defendant. But if plaintiff's testimony raises a presumption of contributory negligence, then it is his duty to remove that presumption, otherwise he would fall in his action." *Citing Hays v. Gallagher*, 52 Penn. St. 140; *Wharton on Neg.*, §§ 435-428; *Robison v. Gary*, 28 Ohio St. 241.

In *Smith v. Boston Gas Light Co.*, in the Massachusetts Supreme Court, Sept., 1880, an action for injury to plaintiff, a child of five years, from the inhalation of gas escaping from defendant's pipes, it appeared that plaintiff and his mother slept in a room adjoining a court in which the pipes from a crack in which the gas escaped were laid; that the mother was found dead and plaintiff insensible; that the accident took place in the night; that there were no gas fixtures in the room occupied by plaintiff, and there was no evidence that the mother had notice of the escaping gas or was conscious of its presence in time to take precautions against its deleterious effect; that on the day before the accident there was no smell of gas in the court; that the mother was a sober and prudent woman. *Held*, that there was evidence sufficient to sustain a verdict in favor of plaintiff for injury by the escaping gas. The burden was upon the plaintiff to show that he and his mother were in the exercise of due care in respect to the occurrence from which the injury arose. But this, as was said in *May v. Boston & Maine Railroad*, 104 Mass. 140, although in form a proposition to be established affirmatively, need not be proved by affirmative testimony addressed directly to its support. It may be shown by evidence which excludes fault. And in the case at bar, there was nothing which excluded the inference that both mother and child on that night went to bed and to sleep in the usual manner with nothing to indicate that there was unusual exposure to injury, and that they were suffocated in their sleep by the gas which escaped from the defendant's pipes. If this were so, they were clearly in the exercise of such care as prudent people ordinarily use under circumstances of similar exposure to injury from hidden and unsuspected causes. *Craig v. New York, etc., Railroad*, 118 Mass. 437; *Commonwealth v. Boston & Lowell Railroad*, 126 Mass. 61; *Hinchley v. Cape Cod Railroad*, 120 id. 257.

McKIM v. McKIM.

(13 R. L. 462.)

Infancy — custody — separation of parents.

In case of separation of husband and wife, equally fit, by character and circumstances, to have the custody of children, the custody of a delicate female child of four years of age will be awarded to the mother for the time being. (See note, p. 698.)

HABEAS CORPUS for the custody of an infant daughter. The opinion states the case.

Charles Hart, James M. Ripley & George Fuller, for petitioner.

Abraham Payne & Francis B. Peckham, Jr., for respondent.

DURFEE, C. J. In this case a writ of *habeas corpus* issued on the request of Charles F. McKim to his wife Annie B. McKim, for the production of their infant daughter. The child was produced in obedience to the writ. She was four years old in August last. She is in appearance delicate and frail. The physician who has attended her for two years testifies that she is afflicted with a bronchitic affection, and with another trouble which impairs her health. She is better now than formerly, but is still delicate, requiring constant watchfulness and care by some person who is familiar with her character and constitution, and that in his opinion she would suffer if taken from her mother, who is devoted in attention to her. Charles F. McKim, the father, lives in New York, where he pursues the profession of an architect. Anne B. McKim, the mother, lives with her parents in Newport, having left the house of her husband in the spring of 1877. The child has always been with her mother. The object of the proceeding is to have her transferred to the custody of the father.

Charles F. McKim, according to the testimony of men who know him well, is a gentleman of excellent character. He married his wife in October, 1874. She lived with him in New York until January, 1875. She then lived with him in Newport, until January, 1876. Their child was born in Newport, August 13, 1875. In January, 1876, they returned to New York, where they resided in a house which was provided and partly furnished for them by Mrs. McKim's father, until May, 1877. Since then she has lived apart from him, and for the most part, in her father's house at Newport. The petitioner represents that their married life was perfectly happy until after the birth of their child, when one Rose Wagner came to live with them as nurse and friend of Mrs. McKim, and too completely monopolized her. He attributes to her presence and influence the estrangement which has led to their separation.

Mrs. McKim denies that the estrangement is attributable to Rose Wagner; and we think the charge that it is attributable to her

not been sustained. Mrs. McKim attributes it to her husband's character and conduct. She accuses him of harshness, untruthfulness, and a low standard of moral sentiment. Her charges, however, except in a single instance, are vague and indefinite, though she intimates that he has been guilty of misconduct, as yet undisclosed, by which he has forfeited her respect, and which renders it impossible for her to live with him again as his wife. No testimony has been submitted to show any misconduct on his part which legally justifies her desertion of him.

We think the petitioner is morally fit to have the custody of his child and that he is entirely competent to provide for her education and physical wants. But on the other hand, the child will doubtless enjoy equally good advantages where she now is, in the house of her maternal grandfather, who is a man of means, and she will have, in addition to them, the affectionate care of a mother, who, whatever her idiosyncrasies, is evidently a lady of superior moral and mental endowments; whereas with her father she will probably have to be confided to a hired nurse or servant. The welfare of the child, considering her tender age, her sex, and the delicacy of her constitution, will in our opinion be best subserved by leaving her for the present with her mother; and indeed we think, that for the present, to take her from her mother is too hazardous an experiment for us to try, unless the law, in deference to the superior right of the father, requires it of us. The question is, then, does the law require it?

The law, as laid down in England in *Rex v. Greenhill*, 4 A. & E. 624, decided in 1836, favored the father at the expense of the mother to such an extent that it shocked the moral sentiment of the nation, and led to a modification by act of parliament. The doctrine of *Rex v. Greenhill*, however, was a relapse from the more reasonable doctrine of earlier cases. In *Rex v. Delaval*, 3 Burr, 1434, decided in 1763, and again in *Blissett's case*, Loft, 748, a few years later, Lord MANSFIELD, while recognizing the preferable right of the father, held that the court had a discretion for the good of the child, to decide each particular case according to its circumstances.

In this country the earlier English doctrine has generally been adopted. In *Commonwealth v. Briggs*, 16 Pick. 203, Chief Justice SHAW said, that "in the case of a child of tender years, the good of the child is to be regarded as the prominent consideration." It

is true that in that case the court decided that the father was entitled to the custody of his child; but the child, though he was only between three and four years old, was a boy, and it does not appear that his health was such as to demand a mother's anxious care. There are American cases — several of them — in which the mother was allowed to retain the custody, solely because of the sex and tender years, or of the tender years, without regard to sex, of the child. In *Ex parte Shumpert*, 6 Rich. 344, the child was a girl between four and five years old, and the court refused to take her from her mother and deliver her to the father. In *Commonwealth v. Addicks*, 5 Binn. 520, there were two female children aged respectively seven and ten, and the court at first refused to transfer them from the mother to the father, though the transfer was made three years later upon a second application. *Com. v. Addicks*, 2 S. & R. 174. In *State v. Paine*, 4 Humph. 523, there were three children, a girl aged five, and two boys, aged seven and three. The court transferred the eldest boy to the father, but left the girl and the youngest boy with the mother, solely on the ground that they were of too tender an age to be removed from the protecting care of the mother. In *State v. King*, 1 Ga. Dec. 93, the child, a girl two and a half years old, was transferred from father to mother, because at her tender age she needed a mother's care. In *People v. Mercien*,* there were several efforts by writ of *habeas corpus* to obtain for a father from the mother the custody of their infant daughter, all of which were unavailing. Hurd on Habeas Corpus, 511-517. See, also, *D'Hauteville's case*, id. 481, and *State v. Baird*, 21 N. J. Eq. 384. On the authority of these cases we think there can be no doubt that it is the well-being of the child, rather than the right of either parent, which ought to control the court in its decision, and that even where the father is of good character and the mother not free from fault, it may yet be the duty of the court, out of regard for the tender age, the sex, or the delicate constitution of the child, to leave the child in the wakeful custody of the mother.

The petitioner presses on our consideration the remark of Chief Justice SHAW in *Commonwealth v. Briggs*, 16 Pick. 203, 205, that "the unauthorized separation of the wife from the husband, without any apparent justifiable cause, is a strong reason why the child should not be restored to her." We are sensible of the weight of

* *I. c.*, A. D. 1830, 8 Pal. 47; 1840, 25 Wend. 64; 1842, 3 Hill, N. Y. 300.

this remark, and if the child here, instead of being a girl, were a boy of somewhat riper age, in good health, we might deem it our duty under the law to restore him to his father, even at the risk of tearing the mother's heartstrings asunder. We are led in this case to leave the child with the mother, not for the mother's sake, but for the good of the child.

The petitioner argues that it will be no detriment to the child to allow him to carry her with him to New York, because the mother will follow. Perhaps she will, but we cannot be sure of it. As we have said, the evidence before us does not show any legal cause of separation. But the evidence does show a strong repugnance on the part of the wife to a renewal of her marital relations, and does also show, that the last year she lived with her husband, her health mysteriously gave away as if it were sapped by secret troubles. Now in view of this evidence we see no reason to believe that the mother, even if she should follow her child, would consent to live with her husband again as his wife, and we very much doubt the wisdom of coercing her to live with him in any other manner. A home so constituted could hardly be a happy home, even for the child.

Our decision is that for the present at least the child be allowed to remain with the mother. We wish to add however a single monitory remark. The mother should remember that this decision is not necessarily definitive, and that while the custody of the child is confided to her, the father's right has not been forfeited. It will be her duty to respect his right and to allow him every proper opportunity to cultivate the affection of the child. Especially will it be her duty to refrain from any attempt to alienate the child from the father, or to instil into her mind any thought or feeling which a daughter ought not to cherish for her father. A failure to observe this monition may be good ground for another application on the part of the petitioner for the custody of his child. But we are confident that the respondent, knowing the wishes of the court, will conform to them.

Let an order be entered recommitting the child to the mother.

Order accordingly.

NOTE BY THE REPORTER.—In *People v. Mercen*, 8 Pal 47, the chancellor awarded the custody of the infant, twenty-two months old, to the mother, living in a state of separation from the husband not illegal or immoral. In the same case, 23 Wend. 64, the Court of Errors held to the same disposition of the child. But in the same case, 3 Hill, 388, the child being then between four and five years old, and feeble, the court awarded the custody of it to the father. The court in the principal case is therefore mistaken in its citation.

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In *People v. Humphreys*, 21 Barb. 521, the Supreme Court of this State awarded the custody of a nursing infant, less than six months old, to the father as against the mother, who had deserted the husband without justifiable cause, and who could not wholly sustain the child from her breast, the father being willing to receive the mother, and provide for her and allow her the care of the child, if she would return.

In *Commonwealth ex rel. Drummond v. Ashton*, Philadelphia Quarter Sessions, 8 W. N. C. 503, the facts were as follows: The relator brought *habeas corpus* for the custody of his two daughters, aged, respectively, nine and six years. The respondent was the maternal grandmother of the children, and they had all lived in the same house together ever since the birth of the elder child, and after the death of the mother, which took place in 1877, until some nine months before this hearing, when the relator left the common residence, saying that the children might remain with the respondent. The evidence was conflicting as to whether the father had furnished the children with money and clothing after that time, as well as with reference to an alleged promise made to his wife before her death that he would always permit the children to remain with their grandmother. In December, 1879, the father proposed going to Virginia to visit his mother and sister, who lived there, and stated that he intended to take the children with him, to which the respondent objected, and from that time she had kept them concealed within doors, so that the father had been unable to see them until they were brought into court under this writ. Mrs. Ashton, the respondent, was about sixty years of age and not in regular employment, but through the assistance of friends was enabled to clothe the children well, and in all respects had given them a good home, sending them to both day and Sunday school, except during the time that they were concealed, which was done, as she alleged, because of her fear that their father would carry them off to Virginia. The father was in receipt of good wages, and testified that he was entirely able and willing to support his children, and there was no evidence whatever affecting his character for soberness and respectability. He had always kept up his intercourse with the children until the time of their concealment. When questioned privately by the judge the elder child said that she loved her father, but he could not support her, and she wished to remain with her grandmother; the younger said that she loved her grandmother and wanted to stay with her also. The parties were all persons of color. The court said: "There is no doubt that in Pennsylvania there is no flexible seven-year rule or any rule prohibiting the court from always consulting the best welfare of the children. And in this case I am impelled by the evidence to think that this will be best subserved by permitting these children to remain with the grandmother. She has been with them all their lives, and nursed them with a parental fondness, and her love for them is not that of a hired nurse, but a really maternal affection; besides, they are of that sex which renders it peculiarly important that they should have the care of a female. I am satisfied that these children now have a good home, and on the other hand I cannot but feel, that although a change which would place them entirely under the control of the father might result happily, there is a very great risk attending it, and I should be in danger of compelling them to exchange a certainty for an uncertainty. He should, however, be entitled to visit them at all reasonable times; but in view of his avowed intention of taking them out of the State, and the grandmother's natural fear, I deem it proper to stipulate that his visits should only be in the presence of the grandmother and some male relation capable of protecting them in case of any attempt to take them by force."

In *English v. English*, Court of Errors and Appeals, 32 N. J. Eq. 738, the wife left her husband in 1873, on account of his "abuse of marital rights," taking with her their two children, a boy aged six, and a girl aged four years. She petitioned for a divorce, but this was denied on his promise of amendment. He entreated her to return to him, but she refused. She was able and willing to maintain and educate the children, and they preferred to remain with her. The father was sober, moral, industrious, and of pecuniary ability. The boy was of a delicate constitution. *Held*, that the wife's acts did not amount to such "misconduct as to deprive her of the custody of the children for the present." The court said: "From every point of view, the cause has given to every member of this court an unusual degree of anxiety and concern in its decision." The decision was based on the supposed welfare of the children, the parents being on an equality. The court strongly intimated that if the boy were of sufficient age and health to enter upon a course

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of business training, the father would be awarded his custody. Dixon, J., dissented, and in one sentence expresses the dangerous tendency of this sentimental course of decision: "If a wife may, in the absence of legal justification, remove herself and her children from their father's domicile, and fix their residence in a place where he may not abide, and still stand before the law upon an equal footing with him as to their custody, then is the headship of the husband and father no longer legally recognized."

Mr. Stewart, the learned reporter of the New Jersey Equity Court, appends a note to this case, which he kindly permits us to use, we extract the following:

"In addition to the authorities cited in the opinions and briefs in this case, and, also, in 3 Bish. Mar. & Div. §§ 529, 542, 546-549; Schouler's Dom. Rel. 335; Tyler on Inf. 273; 2 White & Tudor's Lead. Cas. in Eq. 1506; Hurd on Hab. Corp. 450; *English v. English*, 4 Stew. Eq. 544, note; the following analogous cases may be referred to: *Taylor v. Taylor*, 4 Jur. 959; *Fynn's case*, 2 DeG. & Sm. 457; *In re Agar-Ellis*, L. R., 10 Ch. Div. 49; *In re Besant*, L. R., 11 Ch. Div. 508; 12 Ch. Div. 605; *Corseilis v. Corseilis*, 1 Dr. & War. 235; *Striplin v. Ware*, 36 Ala. 88; *Burge v. Burge*, 88 Ill. 164; *Conn v. Conn*, 57 Ind. 823; *Ryce v. Ryce*, 52 id. 64; *Powell v. Powell*, 53 id. 513; *Zuver v. Zuver*, 36 Iowa, 190; *Pratt v. Nitz*, 48 id. 83; *Green v. Green*, 9 Rep. 176; *Brandon v. Brandon*, 14 Kans. 342; *Adams v. Adams*, 1 Duv. 167; *Harvey v. Lane*, 66 Me. 535; *Harding v. Harding*, 22 Md. 337; *Hill v. Hill*, 49 id. 460; *Corrie v. Corrie* (Mich.), 9 Rep. 445; *Filler v. Filler*, 33 Penn. St. 50; *Hoffman v. Hoffman*, 15 Ohio St. 427; *Clark v. Bayer*, 32 id. 299; *Buckminster v. Buckminster*, 38 Vt. 248; *McGoon v. Irvin*, 1 Pinney, 536.

"No court can compel discordant husbands and wives to live together. *Baugh v. Baugh*, 37 Mich. 59; *Simpson v. Simpson*, 23 Ark. 487, 490.

"In *Taylor's case*, 11 Sim. 178, the parties were married in 1829, and in 1837, the wife left her husband, alleging in justification a charge of adultery, which was wholly without foundation, as she herself afterward admitted. Overtures were made by the husband, but the wife, acting on some friend's advice, refused to return home. The husband, believing her affections to be alienated beyond reconciliation, went abroad with his five children, two over and three under seven years of age. Afterward the wife, in 1838 and 1839, made overtures to her husband, and also an unqualified retraction of her former charges, which however failed to satisfy him. In 1838, she filed a petition for a restoration of conjugal rights, and pending an appeal by the husband from a decree in her favor, she petitioned for the delivery to her of the children under seven years old. Held, that she was not entitled to their custody.

"In *Brooks v. Brooks*, 35 Barb. 85, the parties were married in November, 1836, and their child born in September, 1837. In May, 1838, the wife left her husband's house, in consequence of his ill-treatment, and obtained possession of the child by *habeas corpus*. On the husband's petition for the child, alleging that his wife had left him without just cause or provocation, and absented herself and detained the child against his wishes, held, that the overruling of the husband's offer to prove his allegations in the petition, and that he was of good moral character and competent to take care of, his wife and child, and had frequently offered to do so, was erroneous."

"In *Holmes's case*, 19 How. Pr. 329, the parties were married in 1841, and had three daughters. The husband, in August, 1850, left his wife without any provision and removed to Illinois with all the children, the only grounds of his desertion being that she was irritable and jealous and a spiritualist; the latter charge, however, she denied and substantiated her denial. She alleged and proved that he was a spiritualist with a tendency to free love, and travelled and held public exhibitions with a female medium of similar proclivities. The wife, on *habeas corpus* in Illinois, obtained the youngest child. The husband afterward made overtures to his wife and offered to provide her a home, if she would return, but she refused, not believing in the sincerity of his professions and promises. The eldest child, about seventeen years old, was living with her mother from choice, and also the youngest, about eight, and the second one, about fourteen, with her father. His petition to have the eldest and youngest children given to him was denied.

"In *Price v. Price*, 55 N. Y. 656, an order awarding the custody of a child, twelve years old, to its mother on a divorce obtained by her, was considered so far 'discretionary' that it was not appealable.

"In *Anonymous*, 55 Ala. 498, a wife sought a divorce from her husband, on the ground

McKim v. McKim.

of cruelty, and also sought the custody of her daughter, four or five years old, the only issue of the marriage. The divorce was refused, but the child awarded to her."

"In *McShan v. McShan*, 56 Miss. 413, the parties married in 1871, in Mississippi; soon afterward they removed to Arkansas, and when one child, a daughter, was about two and a half years old and his wife enceinte of another, the husband deserted his family, taking with him all the money his wife possessed. She returned to her father's house in Mississippi, and several months after the second child, another daughter, was born, he also returned, and becoming prosperous in his profession, then made overtures to his wife to return to his house, which she rejected. It was shown that he was a reputable physician, with good professional prospects and of moral habits. *Held*, that his petition, on *habeas corpus*, for his two children, must be refused.

"In *Lusk v. Lusk*, 28 Mo. 91, the parties were married in 1847; in 1850 the husband went to California, intending to return in two years, leaving his wife and two children in Missouri; he remained absent until 1857, and his wife, learning from a letter received in 1864 that he was dead, married again in 1855; on the husband's return, she ceased cohabiting with her second husband. On her petition for a divorce from her first husband on the ground of desertion, and his cross-bill for divorce on the ground of her alleged adultery with her second husband, the court granted him a divorce, and gave him the custody of the children. On appeal, *held*, that although the divorce was good, yet the children must be restored to their mother.

"In *Messenger v. Messenger*, 56 Mo. 329, on cross-petitions, on the ground of desertion, a divorce was granted to the husband, but the two children, apparently about eight and six years old, were ordered to be left with the mother.

"In *Hewitt's case*, 11 Rich. 326, the wife, without justification, abandoned her husband, leaving with him their son, about seven months old. On her petition to obtain his delivery to her. *Held*, that although her own character was excellent, yet as she had established none of her charges of unfitness against her husband, he must retain the child.

"In *Conn. v. Demott*, 61 Penn. St. 305, *note*, a wife, shown to be high-tempered and violent when aggravated by her husband, deserted him, taking with her their daughter, five years and three months old. *Held*, that she was not so incapable of taking care of the child that it must be delivered to its father.

"In *Carr v. Carr*, 22 Gratt. 168, a divorce was granted to a husband for his wife's desertion, although she had been driven thereto by his conduct, which was rude, petulant and penurious. *Held*, that their child, although a female, and only three years old, must be restored to the father.

"In *Welch v. Welch*, 83 Wis. 534, a wife obtained a divorce in 1861 for her husband's desertion, and also the custody of their son, about a year old. Both parents afterward married again. In 1872 the father obtained an order transferring the boy, then fourteen years old, to him, upon his establishing to the satisfaction of the court his ability and desire to provide maintenance and education suitable to the boy's condition and prospects in life.

"In *Foster v. Rerfield*, 50 Vt. 285, on the ground that a petition for divorce involves not only the interests of the immediate parties thereto, but also those of their children and of the public, a court, after hearing a petition brought by the mother of two young children for a divorce, founded on her husband's intolerable cruelty and refusal to support her, declined to grant the divorce, and of its own motion continued the case, with a view to a reconciliation of the parents, and the probable better support and education of the children, and a higher court refused to interfere by *procedendo*. See *Baugh v. Baugh*, 37 Mich. 59.

"In *Chandler v. Chandler*, 24 Mich. 176, a decree of divorce, granted in August, 1868, on account of the husband's extreme cruelty, awarded the child (a boy) then about two and a half years old, to its mother. In January, 1871, the father's petition for the custody of the boy, no change appearing in the circumstances existing when the former decree was made, was denied.

"In *Scoggins v. Scoggins*, 80 N. C. 318, on a wife's petition alleging cruelty, and that her husband was trying to dispose of his property, leave the State and abandon her, alimony was granted, and the custody of the three youngest children, who were girls, given to the mother, and the oldest, a boy, to the father. The ages of the children are not stated in the case.

"In *Bennett v. Bennett*, 43 Conn. 313, the mother of two daughters, aged five and nine years, after living with her husband at irregular times for several years, went to live with her parents, because of her husband's inability to obtain employment, or provide for her. On her petition, alleging desertion, a divorce was denied, and the custody of the children given to the father, who was of good moral character and attached to them, and although he was unsuccessful in business, yet his mother and sister were cultured persons of the highest character, morally and socially, and able, pecuniarily, and willing to assume to support and educate the children."

PECK V. PECK.

(13 R. I. 485.)

Marriage — betrothal followed by cohabitation.

Betrothal, followed by cohabitation, but without a present agreement to become husband and wife, does not constitute a valid marriage.

BILL to enjoin defendant from making claim on estate of plaintiff's intestate, setting forth an antenuptial agreement by which each relinquished all claim arising from the marriage to the property of the other, and that the parties afterward married. The opinion states other facts.

Oscar Lapham & Charles H. Page, for complainant.

James Tillinghast, for respondent.

DURFEE, C. J. The defense to this suit is that the antenuptial contract set forth in the bill as the ground of relief is void,

1. Because it was obtained by duress.

2. Because it was without any adequate consideration and was grossly inequitable.

3. Because the parties to it had before its execution become husband and wife by a common-law marriage.

We do not think the defense is made out on either of these grounds.

[Omitting the first two.]

3. The evidence shows that for more than a year before the marriage was celebrated the parties to it were engaged by mutual promises of marriage, and that during this time she was with child by the other party, which she lost by a miscarriage voluntarily induced by both of them. The husband, however, did not openly

Peck v. Peck.

cohabit with her, nor did he ever take her to his house to live with him until after the nuptial ceremony was performed, though being a widower, he had a home of his own, nor did he acknowledge her as his wife until after that; but on the contrary, when approached by her friends he declared that he intended to marry her, but should take his own time for it, and could not be driven into it.

The defendant contends that the proof of these facts is proof of all that is necessary to constitute the common-law marriage known as a marriage *per verba de futuro cum copula*. She also contends that in this State the common law in regard to marriage has not been abrogated nor superseded by the statute.

Our statute empowers certain functionaries to join persons in marriage, but it does not expressly forbid marriage without their intervention, nor declare that marriage without their intervention is void. It is because the statute contains no such prohibitory language that the defendant contends that a common-law marriage is good. She is supported in this view by high authority. *Hutchins v. Kimmell*, 31 Mich. 127, 130; s. c., 18 Am. Rep. 164, and cases cited; *Dyer v. Brannock*, 66 Mo. 391; s. c., 27 Am. Rep. 359, and cases there cited. But whether our statute is to be similarly construed, we do not find it necessary to decide, inasmuch as we are of opinion that a mere executory agreement to marry does not become consummated by copulation unless the parties so intend. It is indispensable to marriage, whether under the statute or at common law, that the parties consent to be husband and wife *presently*, and though cohabitation following an engagement is evidence of such consent, it is not conclusive, but only *prima facie* evidence of it, and as such open to rebuttal by counter proof. 1 Bish. on Mar. and Div., §§ 253, 254; *Forbes v. Countess of Strathmore*, Ferg. 113; *Queen v. Millis*, 10 Cl. & Fin. 534, 782; *Robertson v. State*, 42 Ala. 509; *Port v. Port*, 70 Ill. 484. See, also, *Cheney v. Arnold*, 15 N. Y. 345; *Duncan v. Duncan*, 10 Ohio St. 181, and Mr. Bishop's criticisms on them, 1 Bish. on Mar. and Div., §§ 255-258. In the case at bar, we think the evidence shows that the parties after their engagement were all along looking forward to a formal ceremony to make them husband and wife, and never agreed or consented to become such without it.

The right to have the contract enforced in equity, if it is obligatory, is not disputed. See *Tarbell v. Tarbell*, 10 Allen, 278; *Mil-*

ler v. Goodwin, 8 Gray, 542; *Andrews v. Andrews*, 8 Conn. 79; 1 Bish. Law of Mar. Women, §§ 422, 423.

Let a decree be entered restraining the defendant from claiming or prosecuting any claim for any share or allowance in or out of the personal estate of her late husband. We confine the decree to the personal estate, for the personal estate being sufficient to pay the debts, the complainant, who brings the suit as administrator, has no concern as such with the realty.

Decree accordingly.

STATE V. DAVIS.

(19 R. I. 492.)

Criminal law — objection to grand jury — plea in abatement.

An objection to the qualifications of a grand juror may be raised by plea in abatement. (*See note, p. 705.*)

THE opinion states the point.

Willard Sayles, attorney-general, for plaintiff.

Marquis D. L. Mowry, for defendant.

DURFEE, C. J. The defendant, being indicted in the Court of Common Pleas, pleaded in abatement "that one of the grand jurors who was taken up on *venire*, to wit, one Benjamin W. Healey, of the city and county of Providence, was not, when impanelled and sworn, and during the sitting of the grand jury and when the indictment was found, qualified to act as a grand juror, not being qualified to vote on any proposition to impose a tax or for the expenditure of money in said city or in any town in the county." The plea was demurred to and overruled. The case comes before us by a bill of exceptions which raises the question whether the plea was rightly overruled. The attorney-general contends that it was on two grounds:

[Omitting the first.]

2. The attorney-general contends that the objection comes too

late after the jury has been impanelled and sworn. He cites which hold that such is the rule; *Commonwealth v. Smith*, 107, 110; *Commonwealth v. Gee*, 6 Cush. 174; *People v. J. Wend.* 314, 321; at least if the accused has previously been to answer. *People v. Beatty*, 14 Cal. 566. Other cases holding the objection may be taken by plea in abatement. *State v. fellow*, 6 N. J. Law, 332; *Commonwealth v. Cherry*, 2 Va. (C) *Stanley v. State*, 16 Tex. 557; *State v. Middleton*, 5 Port *Barney v. State*, 12 S. & Marsh. 68; *State v. Duncan*, 6 Yer, *Doyle v. State*, 17 Ohio, 222; *Huling v. State*, 17 Ohio St. 583; *v. State*, 9 Fla. 9. We think these latter cases rest on the same reasons. It is certainly not reasonable to require a person who has not been held to answer, to object to the juror before he is panelled; for he may be on the other side of the globe, or he may have no reason to suppose he is going to be indicted, being innocent. And even if a person has been held to answer, he may be in prison, or sick at home, or if in court, he may be ignorant, or out of fault, of the disqualification of the juror until after he has sworn. Indeed, a person may be indicted for an offense commencing pending the inquest. Moreover, the action of the grand jury is *ex parte* and preliminary, and it is contrary to principle to require that a person shall forfeit his rights by not intervening in a proceeding to which he is not a party. No English case has been cited, but English treatises of authority recognize the plea. 2 P. C. 155; Bacon Abr., Juries, A; 1 Chitty Crim. Law, 309. statute 11 Henry IV, ch. 9, which has been referred to as the source of the English rule, is deemed to be declaratory of the common law. *State v. Foster*, 9 Tex. 65; *Commonwealth v. Cherry*, 2 Cas. 20. And on the question whether it may not be considered part of the law of this State by adoption, see Dig. of 1767, p. R. I. Col. Rec., vol. 5, p. 289, and Gen. Stat. R. I., ch. 260, § 3.

[Omitting other matters.]

The exceptions are therefore sustained and the indictment quashed.

Exceptions sustained

NOTE BY THE REPORTER. — The question whether the personal incompetency of a grand juror can be taken advantage of after indictment found is much mooted. In the affirmative are Alabama, Virginia, Maine, New Hampshire, Vermont, North Carolina, New Jersey, Tennessee, Georgia, Mississippi, Texas, Arkansas, Nebraska and Rhode Island. In the negative, Massachusetts, New York, Indiana, Pennsylvania, Minnesota. But in

almost universally held that the objection must be raised before general issue. *State v. Easter*, 80 Ohio St. 542; s. c., 27 Am. Rep. 478; Whart. Cr. Pl., § 830, etc.

In *Wallace v. State*, 2 Lea, 29, among recent cases, it was held that objections to the manner of selection and appointment of a grand jury can only be taken by plea in abatement. And in *Reich v. State*, 53 Ga. 73; s. c., 21 Am. Rep. 305, it was held that it is a good plea in abatement that one of the grand jurors was an alien; and so that the venire summoning the grand jury was not sealed. *State v. Flemming*, 65 Me. 142; s. c., 22 Am. Rep. 532.

In *State v. Hamlin*, to appear in 47 Conn., it was held that any objection to the competency of a grand juror, on account of his previous expression of opinion that the accused is guilty, must be taken before the grand jury is sworn. The court in substance said:

"The expression of an opinion that an accused person is guilty, by a grand juror before he was sworn, appears never to have been a ground of challenge in the English courts. Some respectable authorities in this country hold that it is, but these generally hold that the exception must be taken before the grand jury is sworn. The common law requires grand jurors to be good and lawful freeholders and inhabitants of the county, and where that law prevails a disqualified grand juror may be challenged before indictment found. 8 Bac. Abr., Jurors, A; 1 Chitty on Crim. Law, 309; *U. S. v. Williams*, 1 Dill. 422. In *People v. Jewett*, 3 Wend. 314, it is said: 'There are causes of challenge to grand jurors, and these may be urged by those accused, whether in prison or out on recognizance, and it is even said that a person wholly disinterested may as *amicus curie* suggest that a grand juror is disqualified. But such objection to be availing must be made previous to the juror's being impanelled and sworn.' In the case of *U. S. v. Burr*, before the Circuit Court of the United States at Richmond, Va., the prisoner was allowed to challenge grand jurors, on the ground that they had formed and expressed opinions of the prisoner's guilt. But the challenges were made before the grand jury was impanelled and sworn. Burr's trial by Robertson, 33. In Tucker's case, 8 Mass., the court said that Burr's case was solitary in allowing challenges to grand jurors, and a juror objected to by the *amicus curie* was sworn. In *Commonwealth v. Smith*, 9 Mass. 107, it was held that objections to the personal qualifications of a grand juror, or to the legality of the returns, cannot affect any indictments found by the jury after they have been received by the court and filed. In *Musick v. People*, 40 Ill. 303, it was held that if an expression of opinion by a grand juror were a ground of challenge, the objection must be taken before the juror is sworn. In Indiana a person under prosecution for crime, and in custody or on bail, may challenge for good cause any person returned or placed on the grand jury. *Hudson v. State*, 1 Blackf. 317; *Jones v. State*, 2 id. 473; *State v. Herndon*, 5 id. 75; *Hardin v. State*, 22 Ind. 267; *Mershom v. State*, 51 id. 14. In *Hardin v. State* the court say that 'no doubt challenges to the polls may be made where any of the jurors have not the necessary qualifications. These challenges, however, must be made before the jury are sworn and charged.' In Pennsylvania the defendants in the case of *Commonwealth v. Clark*, 2 Browne, 325, being in jail on a charge of homicide, were allowed to challenge grand jurors for favor before the grand jury were sworn. In New Jersey the court in the case of the *State v. Rockefeller*, 1 Halst. 332, held that it was a good plea in abatement to an indictment for rape that one of the grand jurors by whom the bill was found was not a freeholder as required by the statutes of that State. In *State v. Richey*, 5 Halst., a plea in abatement of the indictment, that two of the grand jurors who found it had expressed an opinion before they were sworn, was not sustained. See, also, *U. S. v. White*, 5 Cr. C. C. 457; *Boyington v. State*, 2 Port. 100; *State v. Easter*, 80 Ohio St. 542; s. c., 27 Am. Rep. 478. If a disqualification discovered after indictment found can be taken advantage of, it must be one that is pronounced such by the common law, or by the statute (if it be a matter of statute), and one that absolutely disqualifies, as alienage or the want of a freehold."

HATCH V. TUCKER.

(12 R. I. 501.)

Ship and shipping—liability of consignee for freight—effect of price of trimming cargo.

The consignee and receiver of a cargo is liable for the freight, although the master, owing to a dispute with the person who loaded the vessel at the price of trimming the cargo, sailed without signing the bill of lading; he cannot deduct that price from the freight.

ACTION for balance of freight. The opinion states the following: The defendant had judgment below.

Perce & Hallett, for plaintiffs.

Vincent & Carpenter, for defendants. The contract of ship being between the consignor and the carrier, the latter agreeing to convey the goods, and the former to pay a stipulated price therefor, the consignor is alone responsible to the carrier for the freight. See *Blanchard v. Page*, 8 Gray, 281, 290, 291; *Wooster v. Tarr*, 8 A. 270; *Gage v. Morse*, 12 id. 410.

The obligation to pay freight is not transferred with the goods. See *Sanders v. Vanzeller*, 4 Q. B. 259, 295, 296.

There being no bill of lading, Tucker, Swan & Co. were liable for the freight and any payment made by them to the carrier must be presumed to have been on account of the consignors for their benefit.

POTTER, J. The evidence, as allowed, states that the plaintiff vessel in July, 1877, was loaded by a coal company, consignors, Perth Amboy, New Jersey, with coal for Tucker, Swan & Co., Providence, Rhode Island. The vessel not being properly trimmed, it appears to have been done by the consignors at an expense of \$17.04, which the captain refused to pay to the consignors, and sailed without signing any bill of lading.

Although there are many items of evidence to imply that the cargo was ordered by the consignees, and that therefore, so far as the cargo was concerned, the consignors were agents of the consignees, yet

there is no positive evidence of it, and it is easily to be seen that this might seriously affect the decision.

There is here no dispute about the bill of lading or amount of freight.

The consignors it seems trimmed the vessel and claimed to hold the bill, \$17.04, against the vessel, and because they did, the captain declined signing any bill of lading.

On arrival, the consignees paid the freight, holding back \$30, as they claimed, to cover expenses. They have subsequently paid to the consignors the bill for trimming, \$17.04, and have tendered and still tender to the master the remainder of the \$30.

The two questions presented are: First, the consignee's liability for freight. Second, if they were liable, had they any right to deduct the charge for trimming the load?

It may perhaps be best first to consider the consignee's liability if the master had signed a bill of lading, and then to consider how the liability is affected by the want of a regular bill of lading signed by him.

On reading the cases, it is evident that some confusion arose at first from the supposed difficulty of holding that both consignor and consignee could be liable at the same time. But it is now settled that the consignor still continues liable even after the consignee becomes so. *Maule & Pollock on Shipping*, 253; *Shepard v. De Barnales*, 13 East, 565; 3 Kent's Com. *222; *Wooster v. Tarr*, 8 Allen, 270.

As to whether acceptance under a bill of lading, "he and they paying freight," makes the consignee liable for freight, there are two classes of cases.

Of the one class, a leading case is *Sanders v. Vanzellar*, 4 Q. B. 259, also in 2 Gale & Dav. 244, which holds that while the law will not imply a contract from acceptance, still the circumstances of the acceptance may go to the jury in evidence of a new contract. So *Young v. Moeller*, 5 El. & B. 755, 760, and other cases cited in 3 Kent Com. *222, *sq.* *MacLachlan on Shipping*, p. 466, takes this view.

The other class of cases is represented by *Cock v. Taylor*, 13 East, 399, A. D. 1811, which holds not merely that the acceptance should be submitted to the jury as evidence from which they might infer, etc., but that the acceptance of the goods is evidence of a new agreement. "His receiving them from the master and the master's

parting with his lien and giving them up to the purchaser request, is evidence of a new contract, etc." "The indorsee of the bill of lading knew that they had no right to take the goods from the master without payment of freight."

Dougal v. Kemble, 3 Bing. 383, also, in 11 Moore, 250, "who obtains the delivery of the goods under such a bill of lading contracts by implication to pay the freight due on them. The acceptance of the bill of lading is an original contract to pay the freight of the goods. The receipt of the goods is an original contract to pay the freight of the goods. Per BEST, C. J., *Dougal v. Kemble*, 3 Bing. 389. *Merian v. Merian*, 4 Den. 110. It is well settled that acceptance is enough. *Davison v. City Bank*, 57 N. Y. 81; *Jeason v. Solly*, 4 Taunt.

Bell v. Kymer, 1 Marsh, 146. GIBBS, C. J., "a man most expert for his knowledge of commercial law," holds that "the holders of a bill of lading were bound to know they were liable for freight. The bill was cited and approved by BEST, C. J., in *Dougal v. Kemble*, 3 Bing. 383, 390, 391.

Pelayo v. Fox, 9 Penn. St. 489. Delivery of bill of lading to indorsee who had bought after shipment, makes him liable for freight.

Blanchard v. Page, 8 Gray, 281, 291. SHAW, C. J. If a consignee holding a bill of lading requiring a delivery conditioned on payment of freight, presents it and receives the goods without payment of freight at the moment of delivery, such acceptance under such a claim is evidence of a promise on the part of the consignee to pay the freight, on which, if not rebutted, an action will lie. A majority of the text-writers seem to take this view, that if acceptance is proved, the law implies the new contract.

Bateman's Commercial Law, § 801. The consignee who has received the goods without pay, the law gives the right to demand payment at the place of destination. Citing Jeremy on Carriers, § 10; Story on Bailments, § 586.

Story on Bailments, § 589. When the bill of lading provides for delivery, the consignee or his assignees paying freight, the acceptance of the goods binds the consignee by implication. Citing *Dougal v. Kemble*, 3 Bing. 383.

Kent Com. (vol. 3), *222, says that if the master delivers without payment he may sue the consignee on an implied contract, the delivery without payment being the consideration. This is in the chancellor's text, citing *Cock v. Taylor*, 13 East, 393, and *Brouncker v. Brouncker*, 13 East, 393.

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The books contain very few cases where a cargo is sent a bill of lading; but the foregoing quotations are sufficient, to show that in these cases mercantile usage agrees with principles of the common law as applied to other contracts.

The coal was sent to the consignees. They received it rected the master to deliver it to Smith, which he did. no complaint of want of examination, or that the cargo was aged, or was not what they expected. One of the consignees was received by the defendants. The defendants made no objection to the freight, but paid it all except \$30, which they kept and claimed a right to deduct.

These facts, stated in the reported evidence, would seem sufficient to establish their liability for freight before any jury.

Further, the presumption of law is said to be, in the absence of any evidence on the subject, that the consignee is the owner. PARKE, in *Coleman v. Lambert*, 5 M. & W. 502; *Krudler v. Price*, 47 N. Y. 32; s. c., 7 Am. Rep. 702; citing *Price v. Powell*, 322; *Everett v. Saltus*, 15 Wend. 474.

The defendants' first point in the present case is, that the contract being between the consignor and carrier, the consignee alone liable for freight. And they cite three cases, *Blanchard v. Page*, 8 Gray, 281, 290, 291; *Wooster v. Tarr*, 8 Allen, 270 v. *Morse*, 12 id. 410.

Blanchard v. Page was not a suit for freight, but was brought by the shipper of the cargo against the owners of the vessel to cover for damage done to the goods. The only question in that case was, whether the shipper, who was a mere agent, could sue, it was admitted that the owners, though not named in the bill, could sue. It was not necessary to make any decision as to the rights of the consignee to sue unless owner; but 8 Gray, 291, the court says, that it is not necessary to the decision, what we have quoted is that the acceptance of the goods by the consignee under the circumstances would render him liable for freight.

Gage v. Morse, 12 Allen, 410. was a case of demurrage, and is therefore not like the present. Freight and demurrage are different things and the liability depends on different grounds.

Wooster v. Tarr, 8 Allen, 270, decides that the shipper named in a bill of lading is liable to the carrier for the freight.

though he does not own the goods, and the carrier has waived his lien thereon. The case did not involve the question of the liability of the consignee, nor do any of the remarks of BIGELOW, C. J., affect the present case.

The defendants' second point is, that the liability to freight does not pass with the goods, and they cite *Sanders v. Vanzeller*, 4 Q. B. 259. All which that case decides is, that while the jury might infer a contract to pay freight from the defendant's taking the goods, the court could not infer one as a matter of law.

If the consignee in the present case was liable for the freight, had he any right to keep back \$17.04?

The consignor, the coal company, loaded the vessel. The plaintiffs found the load was not properly trimmed by the men employed by the consignor and that they had not a full load. The consignor claimed to hold the trimmer's bill against the vessel, which the master refused to allow. But the defendants, notwithstanding, paid this bill to the consignor.

The \$17.04 was a matter disputed between the master and the consignors; he had no contract with any but the consignors (*Wooster v. Tarr*, 8 Allen, 270) until a new contract arose by implication with the consignees, and we cannot see that the consignees had any right to deduct it from the freight any more than any debt the captain might owe to any other person.

Ordinarily, the captain and men are to load the vessel, usage and special contract excepted. The captain is to superintend the trimming of his vessel.

And as we have said, the contract as to receiving and loading the coal was between the master and consignors only. If the consignors agreed to load the vessel and it was not properly trimmed, it was the consignors' fault, and they had no claim for it on the captain, whose only duty would be to superintend it. But if the master was to load, it was still a dispute between the master and consignors, and the consignees had no right to withhold it from the master.

The judge having instructed the jury that as the bill of lading was not signed, the master had no claim on the consignees for freight, but must look to the consignors, a verdict under his direction was taken for the defendant.

From the views before expressed it results that a new trial must be granted.

Exceptions sustained.

FALLON v. O'BRIEN.

(12 R. I. 518.)

Negligence — horse escaping to highway.

One whose horse escaped from an inclosure, and strayed on a city street without negligence on the part of the owner in suffering the horse to escape, and recapturing the horse, and injured a person on the highway, is liable for such injury.

ACTION of damages for negligence. The opinion states that the plaintiff had judgment below.

Ziba O. Slocum, for plaintiff.

Charles E. Gorman, for defendant.

DURFEE, C. J. This is trespass to recover damages for injury received by the plaintiff, who is a child of tender years, playing in one of the streets of the city of Providence, in consequence of being kicked by the defendant's horse, which was in the street. The defendant, in defense, submitted testimony to show that it was not his horse, but another's, that kicked the plaintiff, and also to show that he kept his horse, with his cow, in an inclosure, and that though they escaped from it on the day the plaintiff was injured, and were loose in the streets, in the neighborhood, about the time the plaintiff was injured, he immediately pursued them and drove them back. He also submitted testimony to show that his horse was gentle and never known to kick. He requested the court to charge the jury, that if they found he had no knowledge that the horse had a propensity to kick, either from viciousness or playfulness, he would not be liable. The court refused to charge as requested, but charged that there was a natural propensity of a horse, and the defendant was bound to prevent his following it. The defendant further requested the court to charge the jury that if they found he cared for his horse as a careful person would have cared for it, and that without negligence on his part the horse escaped, and straying, did the injury complained of without trespassing on the plaintiff's property, the plaintiff could not recover. The court refused so to charge,

did charge that the defendant was bound to keep his horse from straying, and that if his horse, while astray, kicked the plaintiff, it being natural for a horse to kick, the defendant would be liable for the injury. The jury having found a verdict for the plaintiff, the defendant petitions for a new trial for error in the instructions.

The cases which directly touch the questions presented are few and somewhat discordant. In *Goodman v. Gay*, 15 Penn. St. 188, it was decided that the owner of a horse, who voluntarily permits it to go at large in the streets of a populous city, is answerable to an individual who is kicked by it, without proof that he knew it was vicious. The ground of the decision was that all horses are more or less dangerous when turned loose in the frequented streets of a city, and that all men know it, and that therefore for the owner to permit his horse to go at large in such a street was negligence for which the injured person was entitled to recover, without proof that the owner knew the horse was vicious. In *Dickson v. McCoy*, 39 N. Y. 400, the plaintiff, a child of ten years, was passing along the sidewalk of a populous street in front of the defendant's stable, when the defendant's horse came out, loose and unattended, and in passing, kicked the plaintiff in the face. The proof as to the disposition of the horse was that it was young and playful, but not vicious. The court left it to the jury to find, under the evidence, whether the defendant was or was not guilty of negligence in permitting the horse to be at large. The jury found for the plaintiff, and their verdict was sustained. In *Holden v. Shattuck*, 34 Vt. 336, the defendant's horse, being at large in the highway, excited the plaintiff's horse to run and injure itself, the harness, and the wagon. In this case the highway was a country road. The court held that the defendant had a right, under the law in Vermont, to have his horse in the highway depasturing the roadside on his own land, and that to entitle the plaintiff to recover, it was not enough that the horse was there with the knowledge of the defendant, but that to subject the defendant to liability, it should be made to appear that the circumstances and occasion, or that the character and habits of the animal, were such as to show carelessness on the part of the defendant in reference to the convenience and safety of travellers on the highway. In *Cox v. Burbidge*, 13 C. B. (N. S.) 430, also in 11 W. R. 435, a child, lawfully on the highway, was kicked by the defendant's horse, grazing there. The action was for negligence in keeping the horse. No *scienter* was alleged or proved.

On the contrary, it was in proof that the horse was a quiet animal. There was no express evidence that the horse was in the highway through the defendant's neglect. The court held that it would not lie without an allegation, supported by proof, that the defendant knew that his horse was liable to kick.

It will be seen from this citation of cases that the law is clearly settled. We agree with the Pennsylvania and New York cases, that a horse, even though he is not vicious, is a dangerous animal to be at large in the frequented streets of a city. We do not, however, think that the learned judge who tried this case with reference to the horse, went too far when he instructed the jury that the defendant's horse caused the injury, was absolutely liable for it, without reference to whether the horse's presence in the highway was attributable to his negligence or not. In the American cases cited, it is to be recognized that it is the negligence of the owner of the horse in allowing it to stray in the highway which renders him liable for the injury inflicted by it; and that if he is guilty of no negligence, he is not liable. In the case at bar, the defendant had an undoubted right to keep his horse in the inclosure near the highway. He had as much right to have it there inclosed as he had to have it in the streets harnessed. But if, while driving it harnessed, it escaped from his control without negligence on his part, and running away, had injured the plaintiff, it is perfectly well settled that he would not be liable for the injury. We do not see why he should be any the more liable because the horse, instead of escaping from his control, escaped from an inclosure where he was rightfully kept, unless there was some want of diligence in pursuing and capturing it. We think the jury should have been instructed that if the defendant was not negligent in either of these respects, no action was not maintainable; though, in view of the law of Massachusetts, Gen. Stat. R. I. ch. 96, the jury should also have been instructed that the presence of the horse in the street, going loose and unattended, was *prima facie* evidence of negligence, which, unless rebutted, would entitle the plaintiff to recover.

The judge who held the jury trial doubtless ruled as he did on the analogy to the rule of the common law in regard to the straying of domestic animals from the land of their owner into the land of another person. In such a case the owner is liable for the injury, whether he has been negligent or not. But in such a case the right of passage to the land is the gist of the action, any other injury being

garded as aggravation. The same law does not apply where the injury is merely personal. *Cox v. Burbidge*, 13 C. B. (N. S.) 430.

The defendant makes the point that the proper remedy for the injury complained of by the plaintiff is case, not trespass. The case is not formally before us on this point, but it may save unnecessary expense for us to express our opinion in regard to it. We think it is clear, that unless the defendant intentionally permitted his horse to be at large in the street, trespass does not lie; for otherwise the injury, if it resulted from the defendant's negligence, was a consequential result of it, for which case is the proper remedy. 1 Chitty Pleading, *140. Case was the remedy resorted to in the cases previously cited, except that from New York, where the common-law distinctions have been abolished.

Petition granted.

CARPENTER V. CARPENTER.

(12 B. L. 544.)

Executor — trust, when constituted by — liability for trust funds robbed and misappropriated.

A testator having directed his executors to invest \$5,000 in their names as executors, for the benefit of his grandson, the executors in their books charged themselves as trustees and credited the grandson with that sum, invested it in government and State bonds, and deposited them in a bank vault, in a tin box, in an envelope labelled, "investment of \$5,000 for" the grandson, with the date of purchase; the vault was robbed and the bonds were lost; the executors, giving indemnity, procured new bonds in their place, through an agent, whom they had reason to suppose honest, but who appropriated the bonds, so that some of the amount was lost; *held*, (1) that the trust was duly constituted, (2) that the executors were not liable for the robbery or the misappropriation.

BILL for an account and payment of a trust fund. The opinion states the facts.

Edwin Metcalf, for the complainant, contended: 1. The executors have failed to comply with the directions of the will. They neglected to invest in their own names. The loss is wholly due to this neglect. It ought therefore to fall on them, not on the plaintiff.

iff. No case has yet been found in which the exact meaning of the phrase, "invest in their own names as executors," has been defined. The plaintiff submits that it can have but one meaning, and must be literally obeyed. This alone accounts for its frequent use in approved forms. Hayes & Jarman's Forms of Wills, pp. 128, 133, 136, 189, 195, 197, 234 *et seq.* The books are full of *dicta* confirming the doctrine of literal compliance with a testator's directions: "When the will directs what executors are to do, an executor who proves the will must do as directed." 3 Williams on Executors, 1796. "If there are directions in the instrument of trust as to the time, manner, and kind of investment, the trustees must follow the direction and power so given them." 1 Perry on Trusts, § 452. "Any direction in the trust instrument as to the particular mode and nature of the investment, must be carried out as far as possible." Hill on Trustees, 368. "A trustee is bound to use his legal dominion for those purposes, and those only, which were contemplated by the grantor." Adams' Equity, 55. A trustee, directed to invest in England, chose to invest in this country. Held a breach of trust. *Contes v. Dawson*, 2 Bland, 264. Such change is permitted only when assented to by all parties in interest. *Burill v. Sheil*, 2 Barb. 457, 469. Trustees are held liable for mere neglect to invest when directed to do so. *Gilman v. Gilman*, 2 Lans. 1, 6. So also for investing in insecure railroad stocks when directed to invest in "good, secure and profitable stocks or other securities." *Ihmsen's Appeal*, 43 Penn. St. 431. And for investing in the United States loan when directed to invest in "bank stocks, or land." *Banister v. M'Kenzie*, 6 Munf. 447. So, where the investment is changed without the consent of the party with whose consent a change is authorized. *Kellaway v. Johnson*, 5 Beav. 319. So when trustees directed to invest in real estate mortgages, bought real estate. *MacGregor v. MacGregor*, 9 Iowa, 65, 81.

2. If, however, the original investment can be upheld, the surviving executor must be held to reasonable diligence in its care and accumulation. The plaintiff submits, that the executors did not use reasonable care in making the deposit in bank. They ought to have adopted some method of identifying the bonds as their property, and rendering them valueless to the thief. They were acting beyond the fair scope of their powers as trustees, when they gave to an attorney in fact authority to receive the \$3,000 of the United

States government in a form that permitted and invited a second theft. This loss, in justice, should be theirs. None of their dealings with this attorney show diligence. A considerable sum is expended out of the fund for life insurance, that apparently yields nothing, though the defendant fails to enter this in his account. The defendant, in his evidence, shows these payments were made in a transaction which, if legal, was highly improper for a trustee to be concerned in. No effort seems to have been made to ascertain whether any thing can be recovered from this attorney, much less, to recover it.

Colwell & Colt, for respondent.

DYRFER, C. J. This is a suit in equity brought by Harris L. Carpenter, as legatee, or *cestui que trust* under the will of his grandfather, the late Earl Carpenter, against Charles E. Carpenter, surviving executor of the will, for an account. The clause of the will under which the complainant makes his claim directs the executors, within two years after the death of the testator, to invest the sum of \$5,000 "in such stocks or other productive property as they may deem advisable, in their names as executors," and in the same manner to invest the income and profits, not required for the maintenance and education of the complainant, and the fund so created to pay over to the complainant on his attaining the age of twenty-five years. The will named the defendant and one David C. Anthony, executors. The testator died February 10, 1863. His will was admitted to probate, and the defendant and Anthony accepted the appointment as executors and qualified. The complainant attained the age of twenty-five years November 6, 1878. The bill alleges that the defendant refuses to account or to pay over the fund unless the complainant will accept in full satisfaction of his claim the sum of about \$3,000 deposited in a savings bank, which he declines to do. The bill also alleges that the defendant pretends that he invested \$5,000 as directed by the will in bonds which were stolen, and that he now has what he recovered, on deposit in said savings bank, and that he is only accountable for said deposit; whereas the bill alleges that the investment was not made in the names of the executors and did not constitute a trust fund under the will. The bill prays that the defendant may account for all moneys held in trust for the complainant, pursuant

other corporate stocks or property which is conveyed by written transfer, and should have had it transferred by such transfer into their names ; or if they bought State or United States bonds, that they should have had them registered in their names, and that if they had done so the loss would not have occurred. We suppose there can be no doubt that if they had done so they would have done right. But the question is, did they, in doing as they did, do wrong? Regarding the question as a question of due care, we cannot say that they were so careless that they ought to make good the loss, especially when we consider that the loss occurred in 1865, before the practice of investing in registered bonds had begun to be as common as it is now. Moreover, the will itself authorizes the executors to invest in such stocks or other productive property as they may deem advisable. In the view of the court the real question, and it is the question which has been mainly argued for the complaint, is, did the executors invest "in their names" as directed by the will? What do the words "in their names" mean as used in the will? Is it true, as the complainant contends, that to invest in his own name a man must take by written transfer or record? We think this is to give the phrase too literal a rendering. "Name" is a word of various meaning. A man's name is the synonym of his power and personality. It is often put metaphorically for the man himself. Thus a man is said to bring honor or dishonor on his name when he performs a strikingly good or bad action. An agent is said to buy in the name of his principal when he buys for him, declaring his agency, whether he buys with or without a written transfer. A merchant is said to do business in his own name when he buys and sells avowedly for himself. A man is said to hold his property in his own name when he holds it manifestly as his own, though he may have no written insignia of ownership, as a farmer holds the cattle of his own raising, or the farm which he inherited from his ancestors. And so we think a man invests in his own name when he invests openly for himself, though he only receives the investment by manual delivery ; we think this is the meaning of the will. The testator intended to have \$5,000 invested by the executors in property which they were to hold, distinguished from the assets, as a trust for the complainant. The executors therefore invested the \$5,000 "in their names" when they bought the bonds and designated them for the

trust in an account which they opened in their names as trustees for the complainant.

To see a thing as it is, we must sometimes look at it from different points of view. Let us suppose the bonds had never been lost, and that the investment continued to be made in them and other such bonds, and proved to be highly profitable. Could the executors in that event have supported a claim that the \$5,000 had not been invested "in their names," and that they were therefore only accountable for it with interest at six per cent? Or again, suppose the complainant had died before attaining the age of twenty-five years, bequeathing to his mother whatever the executors had invested "in their names" for him under the will of his grandfather. Can there be any question that such a bequest would have carried the bonds if not lost? In both cases we think it would be decided without hesitation that the executors had duly established the trust by investing the \$5,000 in their names. And in the case at bar, we also think the trust must be held to have been established in the same manner.

The complainant contends that if the trust was constituted, the defendant is nevertheless liable for his subsequent mismanagement of it. He contends that the trustees did not use due care in making the deposit; that they ought to have adopted some means of identifying the bonds and rendering them valueless to the thief, and that they were acting beyond the scope of their power when they authorized an agent to receive the new bonds in a form that permitted and invited a second theft. He contends that for these reasons the loss ought to be made good by the defendant. We think, however, that the trustees used as much care as prudent men ordinarily use in their own concerns, and that is all that was required of them. It is easy for the complainant to be wiser than the trustees after the event; but it is doubtful if before it he would have been either wiser or more careful. "In regard to the preservation and care of trust property," says Story in his Commentaries on Equity Jurisprudence, "it has been said, that a trustee is to keep it as he keeps his own. And therefore if he is robbed of money belonging to his *cestui que trust*, without his own default or negligence, he will not be chargeable. * * * The rule in all cases of this sort is, that when a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses." 2 Story Eq. Jur.,

§ 1269; Perry on Trusts, §§ 404, 441; Lewin on Trusts, 224, 260 (6th ed., London); *Litchfield v. White*, 7 N. Y. 438.

The complainant also contends that investment in a savings bank was not authorized by the will. We are however of the opinion that a deposit in a dividend paying savings bank may be regarded as "productive property."

A decree may be entered referring the cause to a master to take the account, the trust to be treated as duly established. Other matters in regard to the management of the trust which have been alluded to will come up more properly in taking the account or on the master's report.

Decree accordingly.

HORTON V. CHAMPLIN.

(13 B. L. 500.)

Attorney and client—attorney's lien on judgment—how enforced.

An attorney's lien on a judgment does not authorize him to bring a suit thereon in his client's name without his authority.

DEBT on judgment. The opinion states the case.

Rollin Mathewson, for plaintiff.

Bosworth & Champlin, for defendant.

DURFEE, C. J. This action is debt on a judgment for costs recovered by the plaintiff in an action in which the parties were reversed. The present action was brought in a justice court, appealed to the Court of Common Pleas, and comes here by bill of exceptions. One of the exceptions is for the refusal of the court below to dismiss the action on motion of the defendant, because it was brought and is prosecuted without authority. The attorney who prosecutes the action admits that he was not expressly authorized to bring it, but justifies himself on the ground that he was an attorney for the present plaintiff in the action in which the judgment in suit was recovered, and has a lien on the judgment for

Horton v. Champlin.

fees and costs, and he claims, that by reason of this and of his former employment, he was and is entitled to institute and prosecute the action. Is his claim valid? We think not.

The authority of an attorney retained to prosecute or defend an action extends only to the recovery of final judgment and to its enforcement by execution or other subsidiary proceedings. He cannot institute a new action to revive or enforce the judgment without a new warrant or authority from his client. *Kellogg v. Gilbert*, 10 Johns. 220; *Walradt v. Maynard*, 3 Barb. 584; *Lusk v. Hastings*, 1 Hill, 658; *Macbeath v. Cooke*, 1 M. & P. 513; *Macbeath v. Ellis*, 4 Bing. 578; *Richardson v. Talbott*, 2 Bibb, 382; *Hinkley v. St. Anthony Falls Co.*, 9 Minn. 55; *Egan v. Rooney*, 38 How. Pr. 121; *Day v. Welles*, 31 Conn. 344.

The attorney, in support of his right to sue the judgment by virtue of his lien, cites *Woods v. Berry*, 4 Gray, 357; *Stratton v. Hussey*, 62 Me. 283; *Currier v. Boston & Maine R. R.*, 37 N. H. 223; *Marshall v. Meech*, 51 N. Y. 140; s. c., 10 Am. Rep. 572. The first two cases, those from Massachusetts and Maine, hold that the attorney has the right to sue the judgment, by virtue of his lien for fees and disbursements, which in those States is given by statute, no lien at common law having ever been recognized. The cases are therefore not very strong authority for a State where no such statute exists. The other two cases emphatically assert the lien, but do not expressly decide that it authorizes the attorney to sue the judgment. The New York case, however, does hold that the attorney is to the amount of his lien to be deemed an equitable assignee of the judgment, which is perhaps equivalent to holding that he has a right to sue it. But in our opinion it is going too far to hold that the attorney has the same control of the judgment as if it were assigned to him, for if he had, his client could not settle with the adverse party, and it has been repeatedly decided that he can settle with him, unless they collude to cheat the attorney. *Graves v. Eades*, 5 Taunt. 429; also, 1 Marsh. C. P. 113; *Marr v. Smith*, 4 B. & A. 466; *Welsh v. Hole*, 1 Doug. 238; *Pinder v. Morris*, 3 Cai. 165. And even when the parties collude, the remedy is not in the hands of the attorney; but the judgment being released and the sheriff notified not to proceed, the sheriff will be liable as a trespasser if he does proceed, though he proceeds under the order of the attorney for the costs. *Barker v. St. Quintin*, 12 M. & W. 441. The proper course for the attorney

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judgment belongs to the party in whose favor it is rendered. *People v. Hardenbergh*, 8 Johns. 209, it was decided that payment of the costs by the defendant in a suit, in whose favor they are awarded, with the plaintiff is valid, if made without collusion from the defendant's attorney of any claim or lien, and without any collusion to deprive the attorney of his costs. This is inconsistent with the idea of absolute ownership by the attorney. See, also, *Quested v. Callis*, 10 M. & W. 19. We have no doubt that attorneys are accustomed to treat the costs as their property, and the custom is not wholly without warrant, inasmuch as costs do more specifically represent their disbursements and more than the debt or damages. But so far as we know the custom has never been held to authorize the attorney to sue the judgment in his own benefit, or to do more than enforce it by the usual processes, and having collected it, pocket the costs without accounting for them to his client.

The judgment if sued would be liable to statutory set-off; thus the attorney, if allowed to sue it without the consent of his client, might involve him in an unwished-for controversy, with the possible result of a judgment against him instead of one in his favor. *Nicoll v. Nicoll*, 16 Wend. 441; *Brooks v. Hanford*, 11 Pr. 342; *Benjamin v. Benjamin*, 17 Conn. 110.

Our conclusion is that the attorney instituted and is prosecuting the action without authority, and that it must therefore be dismissed; for though the court will presume that an attorney who brings an action has authority to bring it until the contrary appears, yet it will not knowingly permit him to abuse his privilege. When the contrary appears, will, for its own protection as well as the protection of the parties, order the action dismissed. *Frederick County of Calhoun*, 14 Ill. 132; *Crichfield v. Porter*, 3 Ohio, 101; *Campbell v. Bristol*, 19 Wend. 101; *Dobbins v. Dupree*, 39 Ga. 101. Of course, however, we cannot enter any judgment against the plaintiff for costs, for the dismissal is ordered on the ground that the plaintiff is not legally in court.

POTTER, J., concurring. Mathewson, the attorney, brings the suit in the name of Horton as trustee to himself against the defendant. Champlin had sued Horton in an action at law, and judgment was for the defendant Horton for his costs. Mathewson was attorney for Horton, and claims that the costs belong to him, and that therefore he has a right to sue as he does.



A fee is taxed to the attorney every term. But if he therefore can sue in the name of the party there is no reason why a clerk or an officer cannot do the same. And in case of a plaintiff recovering judgment the objection to this course is very obvious.

It is true the clerk and officer, if they have not been paid, can sue the party, so can the attorney.

The plaintiff evidently supposes that he has a lien not only for the costs taxed to the attorney of the successful party, but for his charges and for all his services, sometimes called fees, as he claims a lien for costs in cases where a party recovers debt or damages only and no costs.

It might possibly be for the public good if this was the law. If a man when he began a lawsuit knew that having employed an attorney he could not dismiss him, and that after he had gained his case he would be obliged to have another lawsuit with his own attorney to get his money from him, and so on again, it would tend very much to diminish litigation, and a defendant would get out of such a suit as quickly as possible. It might also make parties more cautious as to choosing attorneys upon whose honor they could rely.

The client in the present case may have shown a disposition to defraud his attorney of his reasonable dues for his services. But we are now only concerned with the general rule.

If any attorney should be entitled to a lien upon a judgment for money for any thing beyond his taxable costs, it would seem that he ought to have the same lien where the recovery is for land. See this question decided and a great number of cases quoted in *Humphrey v. Browning*, 46 Ill. 476.

The lien claimed for the attorney is no part of the old common law. See *Getchell v. Clark*, 5 Mass. 309; *Baker v. Cook*, 11 id. 236, 238; *Simmons v. Almy*, 103 id. 33.

A great deal of confusion may arise from not distinguishing between the costs taxed to the attorney and his charges for services. In many States there are costs taxed as between attorney and client, whereas we have none such here. And in countries or States where such a lien is held to exist, the cases generally recognize that it extends not to counsel fees proper, but to the taxed costs only. *Ocean Insurance Co. v. Rider*, 22 Pick. 210; *Wright v. Cobleigh*, 21 N. H. 339.

In England, the so-called lien is comparatively modern, and it

seems from Comyn's Dig. Attorney, B. 11, and also, B. 16 been founded on an old rule of court, Pr. Reg. 2, 4, implying a client cannot discharge his attorney without leave of the court. It is evidently intended in part to protect the attorney's costs also, Bacon's Abridg. Attorney, E. But its main purpose has been to compel the party to notify the court of a discharge of an attorney, that the court and opposite attorneys might always have whom to serve papers, orders, and notices upon.

In *Mitchell v. Oldfield*, 4 T. R. 123, A. D. 1791, Lord Mansfield said the lien depended on the general jurisdiction over the parties. Buller said that the court had before laid down the rule that it would not interfere to prevent the client from settling his account with his attorney without first paying his attorney. But in that case a rule was made for payment of costs.

In *Wilkins v. Carmichael*, 1 Doug. 101, 104, A. D. 1777, Lord Mansfield said that the lien upon papers was not very strong, but the court had now carried it so far as to stop the payment of money to the client until the attorney's bill was paid. That was the first instance of such an order. In *Hole v. Hols*, 1 Doug. 238, Lord Mansfield said the attorney's lien on money received, for his bill of costs. If it came into the hands of a third person he could retain it, or he might apply to the court and the court would prevent its being paid over until the attorney's bill was paid. But he was inclined to go still farther, and to hold that the attorney might give notice to the defendant, etc. But he thought the court could not go beyond that. In that case the plaintiff compromised the case and the court sustained it.

These cases show that the English practice was not settled very early. And it should be considered that the jurisdiction of the King's Bench is almost without limit, and that they can do things which would not be allowed in our courts.

In this country the practice has varied very much. See Statute of Agency, § 383. In most of the cases usually referred to, the rule is either given or recognized by statute.

In New York it is recognized by statute, but only as to the costs taxed to the attorney and not for services, and it is enough to show how far they have carried the doctrine of the power of an attorney to refer to a case, *Anon.* 1 Wend. 108, where the court is represented (?) as laying it down generally that the client could not control the attorney in the conduct of the suit. If the court only

tended to say the client could not oblige his attorney to argue a point which he knew was against the settled law, which was that case, or to say that no attorney could be compelled by his client to do any thing that would injure his professional reputation, it was reasonable enough, and the attorney should exercise a discretion in this. Within my own experience, I have known lawyers to make points in a case almost as a matter of desperation, and to succeed by them. There is hardly any nonsense for which some authority cannot be found in a large law library.

And in *St. John v. Diefsendorf*, 12 Wend. 261, the New York Supreme Court held, that until notice given, the officer could pay the attorney's costs to the plaintiff without incurring any liability to the attorney.

Platt v. Jerome, 19 How. 384, was a case from the New York Circuit Court. In the Circuit Court Jerome had judgment for costs only and became insolvent. The parties settled the case and agreed that the writ of error should be dismissed. Jerome's counsel opposed the dismissal, and claimed a lien on the judgment for his costs. NELSON, J., says: "It is quite clear he can have no lien for any costs in this court, as none have been recovered against the plaintiff in error. * * * The court looks no further than to see that the application for the dismissal is made by the competent parties, which are usually the parties to the record. * * * He is not a party to the suit nor does he stand in the place of the party in interest. He is in no way responsible for the costs of the proceedings, and to permit him to control them would, in effect, be compelling the client to carry on the litigation at his own expense, simply for the contingent benefit of the attorney." The case had been dismissed and the motion to restore it was denied.

In *Pulver v. Harris*, 52 N. Y. 73, 76, the court held that the suit was subject to the control of the party; that the attorney had a lien after judgment, but not before. The latter would prevent the party from settling his case; and see *Simmons v. Almy*, 103 Mass. 33; *Averill v. Longfellow*, 66 Mc. 237.

In Massachusetts the lien was evidently derived from statute originating in 1810. The provision in the Massachusetts Digest of 1860, ch. 121, § 37, substantially, I believe, the same, provides that an attorney lawfully possessed of an execution or who has prosecuted a suit to final judgment for his client, shall have a lien thereon for the amount of his fees and disbursements in the cause, but this

shall not prevent the payment of the execution or judgment to the judgment creditor without notice of the lien.

The Massachusetts courts have expressly recognized that there was no such lien at common law (*Baker v. Cooke*, 11 Mass. 236, 238; *Getchell v. Cooke*, 5 id. 309); that it depends on the statute of 1810 (*Baker v. Clarke*, *supra*; *Dunkles v. Locke*, 13 Mass. 525); and that although it speaks of fees and disbursements, it refers to taxable costs only, and does not include counsel fees. *Ocean Ins. Co. v. Rider*, 22 Pick. 210; and in *Getchell v. Clarke*, *supra*, the power of the plaintiff to settle before judgment, or to settle afterward, is fully recognized.

In *In re Paschal*, 10 Wall. 483, which was a case from Texas, the court, while recognizing a lien for disbursements and professional services, also allowed the attorney to be changed before his costs were paid, saying that the party was amply able to respond to whatever he might recover.

I have made these remarks upon the doctrine in general, and as to its extent in England and in this country, because they have a bearing on the question before us, and as showing the conflict of decisions, and that they depend very much on local law and usages.

In *Forsythe v. Beveridge*, 52 Ill. 268; s. c., 4 Am. Rep. 612, the Supreme Court held that there could be no lien except when statutes or rules of court allowed specific fees as taxable costs. A portion of their opinion is worth quoting.

"But besides this distinction, there is another of quite a different character, but entitled to great weight. Where the fees are fixed by law or rule of court and taxed, the attorney can exercise no unreasonable power over his clients by means of this so-called lien. The amount of the attorney's interest in the judgment being easily determined, the owner of the judgment can deal with it, as he would with any other chose in action in which another person has a limited and fixed interest. There is little room for controversy between the client and his attorney, and if the sheriff collects the money on execution, he can ascertain the amount of taxed costs, and need only retain for the attorney this amount. But suppose we hold this lien exists on the principle of a *quantum meruit*, what would be the result? A plaintiff obtains against a solvent defendant a judgment for a large amount. His attorney demands an exorbitant fee, the client demurs to the payment, and the attorney informs

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attendance is expressly taxed for the party, and how any attorney can have any claim for this it is hard to see.

It is not to be denied that the attorney generally collects the debt and whole costs, and uses it in settling with his client. The plaintiff's attorney in this case claims the costs by an equitable assignment. It is not contended that there was any express assignment. An equitable assignment is where a party intends to do something, to convey some right which cannot be enforced at law, but only in equity.

There is no pretense that there ever was an agreement or intention to assign this bill of costs to the plaintiff's attorney. It cannot be claimed by usage. Usage cannot control the express words of the statute which gives the travel and attendance to the party. There having been no assignment of the judgment, the action cannot be sustained in the name of the party as trustee to the attorney.

Exceptions sustained, case dismissed, no costs.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

REED V. STATE.

(8 Tex. Ct. App. 40.)

Criminal law — larceny — lost property.

To constitute larceny of lost property the finder must have had a larcenous intent at the moment of finding. (*See note, p. 784.*)

CONVICTION of larceny. The opinion states the case.

Thomas Ball, assistant attorney-general, for the State.

WINKLER, J. The question of intent enters into every case of theft. Generally, a fraudulent intent must exist in the mind of the person accused; at the time of the taking, as the offense of theft is defined in art. 724 of the Penal Code. In all cases the taking must be wrongful. If property came into the possession of the accused by lawful means, the subsequent appropriation of it is not theft. But if the taking, though originally lawful, was obtained by any false pretext, or with an intent to deprive the owner of the

value thereof and appropriate the property to the use and possession of the person taking, and the same is so appropriated, the act of theft is complete. Penal Code, art. 727.

The Code does not specially provide as to theft of property which had been lost by the owner and found by the finder. In an investigation of authority for a definite rule by which the finder may be guided in the present and similar cases, where theft is committed upon lost property, we are of opinion that the authorities cited in the cases produced by Mr. Archbold in considering the case of *Regina v. Dunne*, 2 Car. & Kir. 830. He says: "From this decision it may be a safe guide in all cases hereafter, it appears that the act of finding, in larceny, may be classed under three heads. *Firstly*, Where upon the finding the party has no intention to appropriate the thing found to his own use, but on the contrary, intends to restore it to the owner when found, but afterward he disposes of it to his own use, either before or even after he knows who the owner is, this is not larceny; because there was no *animus furandi* at the time of taking. *Secondly*, Where a man finds goods which have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing then that the owner cannot be found, and he afterward disposes of them to his own use, either before or even after he knows who the owner is, it is not larceny, because the taking, though not exactly innocent, was not felonious, and could not be made the subject of an action of larceny. *Thirdly*, Where a man finds goods that have been actually lost, or are reasonably supposed by him to be lost, and appropriates them with intent to take the entire dominion over them, he at the time knowing or really believing the owner can be found, it is larceny, whether the finder afterward converts them to his own use or not." 2 Archb. Cr. Pr. & Pl. 388-395, side p. 389. By applying this rule in connection with the articles of the Code above cited, a safe rule will be found to determine the present case.

It is shown by the testimony that the alleged owner had a pocket-book, containing the money described in the indictment, and that besides the money the pocket-book contained papers which the owner could have been known and the property seized, and among the contents was the business card of the defendant, giving his name and place of business, which was in the same

and near by where the pocket-book was lost. Very soon after the loss the owner saw the defendant and apprised him of it, when the defendant stated that he had seen a negro boy, whom he did not know, with the pocket-book in his possession. One witness testified to having seen a negro boy and the defendant together, the negro boy having the pocket-book and the defendant obtaining possession of it. At this time the money was visible, the ends of the bills protruding from the pocket-book, which seems not to have been seen afterward, and was not recovered. A roll of money answering the general description of that mentioned in the indictment, amounting to \$43, was found secreted in the house of the defendant, where he lived alone, and in the roll was one bill which was clearly identified by the owner as of the contents of the pocket-book when lost. Under these circumstances the jury were warranted in coming to the conclusion that the defendant, when he obtained possession of the pocket-book, whether he found it himself or obtained it from another who had found it, intended to deprive the owner of it and to assume dominion over it; and further, that he had in fact so appropriated it was plainly inferable from the testimony, which brought him within the third rule of Mr. Archbold and article 727 of the Penal Code.

The intent was to be discovered from the evidence, under appropriate instructions from the court. The charge of the court was an accurate enunciation of the law as herein laid down. The court did not err in its charge, or in refusing to give the special instructions asked by the defendant's counsel.

Finding no error, the judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — See, to same effect, *State v. Dean* (49 Iowa, 73, 31 Am. Rep. 143; *State v. Clifford* (14 Nev. 72), 33 Am. Rep. 535. *Brooks v. State*, 35 Ohio St. 49, an indictment for larceny, was decided by a divided court. The facts are stated in the dissenting opinion of OREY, J., *infra*. WHITE, J., in the prevailing opinion, said:

"It was not necessary to the conviction of the accused that he should, at the time of taking possession of the property have known, or have had reason to believe he knew, the particular person who owned it, or have had the means of identifying him instantaneously.

"Larceny may be committed of property that is casually lost as well as of that which is not. The title to the property, and its constructive possession, still remains in the owner, and the finder, if he takes possession of it for his own use, and not for the benefit of the owner, would be guilty of trespass, unless the circumstances were such as to show that it had been abandoned by the owner.

"The question is, under what circumstances does such property become the subject of larceny by the finder?

"In *Baker v. State*, 30 Ohio St. 134; s. c., 23 Am. Rep. 731, the rule stated by BARON PARK in *Thurborn's* case was adopted. It was there laid down that 'when a person finds

Reed v. State.

goods that have actually been lost, and takes possession with intent to appropriate to his own use, really believing at the time, or having good ground to believe owner can be found, it is larceny.'

"It must not be understood from the rule as thus stated that the finder is bound to exercise diligence or to take pains in making search for the owner. His belief, or ground in regard to finding the owner, is not to be determined by the degree of diligence he might be able to use to accomplish that purpose, but by the circumstances appearing at the time of finding the property. If the property has not been abandoned by its owner, it is the subject of larceny by the finder, when at the time he finds it he has ground to believe, from the nature of the property or the circumstances under which it was found, that if he does not conceal but deals honestly with it the owner will be ascertained. But before the finder can be guilty of larceny the intent to steal must have existed at the time he took it into his possession.

"There are cases in conflict with the foregoing view; but we believe it correct and well supported by authority. *Queen v. Glyde*, L. R., 1 C. C. 189; *Moxley v. Leigh & Cave's* C. C. 1; *Regina v. Knight*, 12 Cox, 102; *Commonwealth v. Titus*, 43; s. c., 17 Am. Rep. 188; *Ransom v. State*, 22 Conn. 153; 2 Russ. on Crimes (9th Eng.), 179, 180, and note there found to *Thurborn's* case."

OSBY, J., dissenting, said: "I do not think the plaintiff was properly convicted as a scavenger, while in the performance of his duties in cleaning the streets, picked up the mud and water in the gutter a roll of money, consisting of bank bills of the denominations of five, ten and twenty dollars, and amounting in the aggregate to two hundred dollars. It had lain there several weeks, and the owner had ceased to make search for it. The evidence fails to show that the plaintiff had any information of a loss previous to finding, and in his testimony he denied such notice. There was no mark on the money to indicate the owner, nor was there any thing in the attending circumstances pointing to any one owner more than another. He put the money in his pocket without calling the attention of his fellow workmen to the discovery, and afterward, on the same day, converted it to his own use.

"No doubt the plaintiff was morally bound to take steps to find the owner. A man would not thus appropriate money before he had made the finding public and offered to find the owner. But in violating the moral obligation I do not think he incurred criminal liability.

"*Baker's* case, 29 Ohio St. 184; s. c., 23 Am. Rep. 731, was correctly decided. It is in the opinion not only that when he took the goods he intended to appropriate them to his own use, but that he had reasonable ground for believing that Alden was the owner. The passage from *Regina v. Thurborn*, 1 Den. C. C. 387, is cited in that case as containing a correct statement of the law. But a careful examination of *Regina v. Thurborn* shows that the court which rendered the decision would not have sustained this conviction. That case has been repeatedly followed in England and this country. *R. v. Prestor*, C. C. 351; *R. v. West*, 6 Cox, 415; *R. v. Dixon*, 7 id. 35; *R. v. Christopher*, 5 Jur. (Ct. R. v. Glyde, 11 Cox, 103; *R. v. Knight*, 12 id. 102; *Tanner v. Com.*, 14 Grat. 665; 10 Cogdell, 1 Hill (N. Y.), 94; *Lane v. People*, 5 Gilman, 305; *State v. Conway*, 18 Mo. Lead. Cr. Cas. 31; *Badley v. State*, 52 Ind. 462; s. c., 21 Am. Rep. 182.

"The obligation stated in the syllabus, that the finder must deal 'honestly' with the money, is too indefinite, and the opinion contains no satisfactory explanation of it. It leaves both law and fact to the jury without any rule to guide them. What one juror might think was honest dealing another jury might think was the reverse. The adverb, 'honestly' or 'rightfully' would have been as certain."

GILMORE, C. J., concurred in the dissenting opinion.

RAINEY V. STATE.

(8 Tex. Ct. App. 62.)

Criminal law — concealed weapons — in ball room.

Under a statute prohibiting the carrying of weapons "into a ball room, social party, or social gathering," an indictment which alleges the going into a ball room with a pistol on the person, but not alleging that there were other persons there assembled, is insufficient.


CONVICTION of unlawfully carrying weapons. The opinion states the case.

Ponton & Fly, for appellant.

Thomas Ball, assistant attorney-general, for State.

WINKLER, J. The appellant was prosecuted in the county court, under the act of April 12, 1871, Rev. Penal Code, art. 320, by information which charges that he did "unlawfully and willfully go into a ball-room with a pistol on his person, the said Rainey not then and there being an officer of the peace." By the article of the Penal Code it is provided: "If any person shall go into any church or religious assembly, any school-room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball-room, social party, or social gathering, * * * and shall have or carry about his person a pistol, etc., he shall be punished," etc.

The evident intent and purpose of the law is to protect the several assemblies mentioned in the article, whether religious, political, social, or scientific, from intrusion by any person (except those designated in art. 321, Penal Code) going into them and carrying or having about his person any of the arms mentioned in the article, and not the protection of a bare church-edifice, school-room, or ball-room, without reference to the persons there assembled. Hence the charge in the present case, that the defendant went into a ball-room with a pistol on his person, without any averment indicating that there were persons there assembled to be protected,



does not allege an offense against the law. *Owens v. State*, Ct. App. 404.

The information is not sufficient to support the verdict and judgment, and on this account the judgment must be reversed.

[Omitting *obiter dicta*.]

The judgment is reversed because of a defective information; the cause is remanded.

Reversed and remanded.

ALBRECHT V. STATE.

(8 Tex. Ct. App. 216.)

Constitutional law — taxation — "bell-punch" law.

The act to provide for the levy and collection of an occupation tax on the sale of spirituous, vinous and malt liquors, in quantities less than a quart to compel vendors to hire of the tax collector and make use of reg- istry commonly known as the "bell-punch," is constitutional, although it levies a tax for the use of the State and of counties, without particular specification in the title, and prohibits the collection of like taxes by the county tax collector on property without reference to its value.

CONVICTION of unlawfully selling beer. The indictment substantially charged that the defendant sold beer without reg- istry on his "bell-punch." The opinion states the points.

Charles Stewart, for appellant.

Thomas Ball, assistant attorney-general, for State.

CLARK, J. This appeal brings before us for consideration the constitutionality of an act of the legislature of the State of Texas, entitled "An act to provide for the levy and collection of an occupation tax on the sale of spirituous, vinous and malt liquors in quantities less than a quart, and to make appropriate provisions to carry the same into effect," approved April 3, 1879, and commonly designated as the "bell-punch law." The particular grounds upon which it is contended by appellant that the act is unconstitutional are, briefly stated, as follows:

1. Because the act contains more than one subject, in this

- (a) It levies a tax for the use of the State.
- (b) It levies a tax for the use of counties.
- (c) It prohibits the levy of a tax on the same subject by the County Commissioners' Court.
- (d) It provides for and regulates the levy and collection of taxes by the cities and towns within the State.

2. Because the subject of the act is not expressed in its title; the subjects of the act being as stated above, and not being expressed in its title.

3. Because the act undertakes to provide for the levy and collection of a tax on property without reference to its value.

4. Because the act levies a tax which, as an occupation tax, is not equal and uniform upon the same class of subjects.

5. Because the act, in undertaking to provide for the levy and collection of a tax for the use of the counties, and in prohibiting the collection of a tax on the same subject by the counties, usurps the powers and duties of the Commissioners' Courts of the several counties in respect to the management and control of the business and affairs of their respective counties under the Constitution and laws, and is repugnant to the ancient and well-established political institutions of the State, by which the people of the several counties are entitled to be taxed for county purposes by the immediate representatives of the respective counties, to wit, the Commissioners' Courts, and by no other authority.

6. That said statute requires citizens carrying on a lawful business to pay the tax-collector annually a pretended rent or hire for machines to be employed for the exclusive use of the government, said annual rent or hire being greatly in excess of the actual cost or value of such machines, and no provision being made for its payment over by the tax collector into the treasury of the State.

Other grounds of constitutional objection were made in the court below, but as they have not been insisted upon in this court, they will not be discussed.

The purpose and scope of that provision in our State Constitution which requires that no bill, with certain exceptions, shall contain more than one subject, which shall be expressed in its title, cannot at this day be a matter for conjecture or controversy. Since the adoption of our first State Constitution, which together with subsequent constitutions down to that under which we now live, contained a provision substantially though not altogether similar,

the meaning and construction of the provision have been considered and determined by the courts, and are now ascertained as adjudication and exposition can make them. *v. Hemphill*, 7 Tex. 208; *Parker v. Parker*, 10 id. 86; *Robt State*, 15 id. 312; *Tadlock v. Eccles*, 20 id. 792; *State v. Sh* id. 404; *Breen v. Texas and Pacific R. R. Co.*, 44 id. 302; *v. Galveston County*, 45 id. 291; *Giddings v. San Antonio* 548; *Holden v. State*, 1 Tex. Ct. App. 225; *Hasselmeyer v. St* 690; *Ex parte Mabry*, 5 id. 93; *English v. State*, 7 id. 171 purposes intended to be effected by this section were to [the incorporation into one bill, of provisions of a nature to] verse and without necessary connection, with a view to a general combination of the particular friends of each measure thereby secure their enactment when some or all of them likely fail of becoming laws if left to stand upon their own and also the entrapping of legislators into the support of a bill which, by dexterous management, some insidious provision been inserted of which the title gave no intimation. In construing the provision, therefore, courts have almost uniformly refused to adopt a strict and literal construction, which would inevitably lead to the serious embarrassment of legislation, and have uniformly sustained legislation when the several provisions of the act fairly indicated in the general object as stated in the title, under the rule adopted by themselves, giving to the sections a broad and liberal construction. The general purpose of the provision is accomplished when a law has but one general object, which is indicated by its title, and the generality of the title is not objectionable so long as it is not made a cover to legislation incongruous with itself, and which by no fair intendment can be considered as wanting a necessary or proper connection. *Breen v. Texas and Pacific R. R. Co.*, 44 Tex. 302; *Giddings v. San Antonio*, 47 id. 54; *Ex parte Mabry*, 5 Tex. Ct. App. 93; *Railroad Co. v. Potts*, 7 Ind. 1; *People v. Briggs*, 50 N. Y. 553; *Cooley's Const. Lim.* 141-142.

Examined in the light of these established principles, we are enabled to say that the legislation in question is violative of the particular provision of the Constitution. The general subject-matter is the levy and collection of an occupation tax on the sale of spirituous, vinous, and malt liquors in quantities less than a gallon, and this is clearly and expressly stated in the title. Estimated by its title, it is not an attempt to provide for the levy and collec

a State occupation tax on this character of employment, or a county occupation tax, or a municipal occupation tax, or a special occupation tax, but it may well be inferred, even from the title, that it was in contemplation to provide a general system of occupation taxes for the State and all its municipal subdivisions, applicable to that particular vocation, separate and apart from the general system of *ad valorem* taxation upon property, and the system of license taxation as pertaining to other avocations taxed. The title is broad enough to comprehend State, county, and municipal occupation taxes, when taken and construed with reference to the express language employed, and it is only by inference in opposition to positive terms that it can be construed as intended to apply exclusively to State taxes and no other. It is our duty to give effect to the plain import of legislative language, which we must assume was not idly or loosely employed, rather than to search for some inference upon which to base a construction in opposition to the unmistakable language of the law-making power. The several provisions of the act in question are sufficiently indicated in its title; but if some were not, the only effect would be, under the same section of the Constitution, that such as were not so expressed would be declared a nullity, leaving the remainder to stand as the law of the land. Const., art. 3, § 35. The result would be the same without any express constitutional provision to that effect. Cooley's Const. Lim. 148.

This brings us to the consideration of the objection that the act contains more than one subject, which may be discussed and determined in connection with another ground of objection, viz., the undertaking to provide for the levy and collection of a tax for the use of the counties, and prohibiting the collection of a tax on the same subject by the counties. In so far as that provision is concerned which provides for and regulates the levy and collection of taxes by the cities and towns within the State, it may be disposed of here with the single remark that its validity can be best determined when a case is presented involving the attempt on the part of some municipal corporation to avail itself of the privilege afforded by the statute, and its resistance by due course of law on the part of some citizen directly interested in its non-enforcement. For the purposes of this case, it may be valid or invalid without affecting in any manner a right decision of the questions presented.


The statute unquestionably levies a tax for the use of the State

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and also a tax for the use of the counties, and it also prohibits the levy of a tax on the same subject by the county commissioners; but this does not render it obnoxious to constitutionality. These provisions are all germane with each other, all clearly included within the general subject as manifested by the enactment, which is the levy and collection of occupation tax on the sale of spirituous, vinous, and malt liquors in quantities less than a quart. In the adoption of the system the legislature was authorized to include in the same enactment every regulation deemed essential to the perfection of the system and necessary to complete its efficiency; and if, in their wisdom, they deemed it compatible with justice and public policy to inhibit local authorities of the counties from interfering with the operations of the system, they were contriving, and from imposing additional burdens upon a class of citizens upon whom the system was designed to operate. Such regulation is as much a part of the general subject of the tax as those providing for the levy and collection of the tax. The power to levy and provide for the collection of the tax carries with it the incidental power to provide, in the same enactment, all necessary means for the accomplishment of the legislative purpose properly connected therewith. *Cooley's Const. Lim.* 146; *Ex parte Albrecht*, 7 Tex. Ct. App. 171.

It is urged that the act, in undertaking to provide for the levy and collection of a tax for the use of the counties, and in prohibiting the collection of a tax on the same subject by the counties, is in violation of the powers and duties of the Commissioners' Courts of the counties in respect to the management and control of the business and affairs of their respective counties under the Constitution and laws, and is repugnant to the ancient and well-established political institutions of the State, by which the people of the several counties are entitled to be taxed for county purposes by the immediate representatives of the respective counties, to wit, the Commissioners' Courts, and by no other authority. In the grant of powers under the Constitution to the several departments of government, the taxing power was devolved upon the legislative branch. The authorities are abundant and uniform to the effect, that even in the absence of an express grant, the taxing power passes to the legislature by the general grant of legislative power, and that there is no limitation on its exercise except the restrictions that may be imposed by organic law. *Cooley on Tax.*, 32-66. The grant is specific



us, and about as comprehensive as language can make it. Const., art. 8, § 17. County Commissioners' Courts are provided for in the Constitution, but they are invested only with such powers and jurisdiction over all county business as may be conferred by the Constitution and laws of the State. Various duties are devolved upon these tribunals by different clauses in the Constitution, but their taxing powers are derived solely from statutes, except they are constituted a board of equalization by the Constitution, art. 8, § 18.

Courts are not authorized to hold a statute unconstitutional, merely because in their opinion it may be violative of public policy, or contrary to what they may esteem the general spirit of the Constitution or the genius of our political institutions. When they conclude that an act of the legislature is void by reason of its unconstitutionality, they must be able to point with certainty to the exact provision of organic law violated by the enactment. *Cooley's Const. Lim.* 164-169. Subject to the limitations of the Constitution, the local affairs of each political subdivision of the State are completely within the control of the legislature and are creatures of its pleasure; and counties are perhaps more completely so than municipal corporations proper. So perfect is the legislative power over counties that they exist only by its sufferance, and they can exercise the taxing power only when it is delegated to them by the legislature in the particular instance, and without such legislative warrant their attempt to enforce taxation would prove futile. The power to delegate necessarily implies the power to withhold, to change, to modify and to prohibit, and it is competent for the legislature, in an emergency, to administer county affairs through agencies other than those usually provided by general statute or custom. *People v. Mahoney*, 13 Mich. 500; *Hamilton v. St. Louis County*, 15 Mo. 20; *State v. St. Louis County*, 34 id. 546; *People v. Draper*, 15 N. Y. 547. Maxims and customs in government, which have been sanctified by age and experience, address themselves with peculiar force to the wisdom of the legislature, and to adhere to them as far as possible is doubtless to keep in the path of wisdom; but they do not constitute restrictions so as to warrant the other departments in treating the exceptions which are made as unconstitutional. *Cooley's Const. Lim.* 170.

The third ground of objection is that the act undertakes to provide for the levy and collection of a tax on property without reference to its value. If this is true, in a legal view, then, as has been

said in argument, few or none of the taxes imposed upon occupations are constitutional. Taxes levied upon the occupations of merchants, drummers, photographers, ship-chandlers, and many others that might be named, come within the category; and yet the Constitution expressly authorizes the legislature to impose occupation taxes, both upon natural persons and corporations, other than municipal, doing any business in this State. It places no limitation whatever upon the power, save to require that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. No occupation tax shall be levied on pursuits agricultural or mechanical. Const., art. 8, §§ 1, 2. The right to levy an occupation tax on retail dealers is therefore beyond question, and it only remains to be ascertained if the tax in question is an occupation tax. In the authorities this seems to be equally as clear. Judge Cooley, in his work on Taxation, says: "The methods in which business shall be taxed are also in the legislative discretion. The methods which are most customary are: 1. On the privilege of carrying on the business. 2. On the amount of business done. 3. On the gross profits of the business. 4. On the net profits, or profits derived from the business. But the tax may be measured by other standards, prescribed by the legislature for the purpose, as well as by these. * * * It is no constitutional objection to any such tax that it duplicates the burden to the person who pays it. To tax a merchant upon his stocks as property, and also upon his gross sales, may seem burdensome, but it is not unconstitutional when not expressly forbidden by the Constitution. The two taxes are not identical, and though they may be unequal and unjustly in particular cases, they are supposed to be imposed for the purpose of raising revenue, and the general result is equal and just." Cooley on Taxation, § 100.

In a recent well-considered case in Tennessee, involving the power of the legislature to impose an *ad valorem* tax upon the property in trade of a merchant, and also an occupation tax equal in amount to the *ad valorem* tax, Chief Justice NICHOLSON, in announcing the opinion of the court sustaining the constitutionality of the taxes, commends the doctrine in *Brown v. Maryland*, 12 Wheat. 44, and deduces clearly the distinction between the doctrine of that case and the subsequent cases in the same line, and cases like this at bar. In the course of an elaborate and able opinion this language occurs: "But it is contended that as an *ad valorem* tax was assessed upon the plaintiff's merchandise, equal to the tax on other property, it

ditional tax could be assessed against him as merchant. Under the construction we have placed upon the Constitution, the legislature had the power to determine the amount of tax to be assessed upon the plaintiff as merchant, and also to determine the manner or mode in which the tax should be assessed and collected. It was therefore competent for the legislature to provide that the amount assessed upon the plaintiff should be ascertained by requiring an amount equal to the *ad valorem* tax to be assessed against him as merchant. It is the manner or mode prescribed for assessing the tax on merchants, and falls clearly within the discretion conferred upon the legislature, both as to the amount of the tax and the manner of ascertaining and assessing it. * * * The fact assumed by the court in *Brown v. Maryland* may be conceded to be true in the present case: that the merchant may, if he choose, impose upon his goods the additional license tax which he is required to pay, and in that way the selling price of his goods may be enhanced. In this way the merchant becomes a tax-gatherer for the State, instead of a tax payer. It is because of this power that he has to reimburse himself by adding his own taxes to the price of his goods, that the merchant has at all times been taxed nominally much higher than those whose taxes depended on the value of their property. In this way he has been an important financial agent of the State, in assessing and collecting taxes from the consumers of his goods. It was reasonable to presume that it was on account of the peculiar nature of his occupation, and his power to protect himself from unjust taxation by distributing the burden among his customers, that the framers of the Constitution of 1834 and of 1870 expressly subjected the merchant to the unrestricted power of taxation by the legislature." *Jenkins v. Ewin*, 8 Heisk. 481 *et seq.* See, also, *Walcott v. People*, 17 Mich. 86; *Straub v. Gordon*, 27 Ark. 625; *Hodgson v. New Orleans*, 21 La. Ann. 301; *Burch v. Mayor, etc.*, 42 Ga. 596; *Bohler v. Schneider*, 49 id. 195. Our conclusion is that the tax in question is a tax upon the business of a retail dealer in spirituous, vinous, or malt liquors, and not a tax upon the property employed in such business.

It is hardly necessary to discuss the remaining grounds of objection, to wit, that the act levies a tax which, as an occupation tax, is not equal and uniform upon the same class of subjects, and undertakes to collect money, not as a tax, but as annual rent for

"registers," with no provision for the payment of said in the treasury.

The class of subjects proposed to be taxed were retail spirituous, vinous, and malt liquors, and the provisions are made to apply to all such dealers within the limits of authority levying the tax. That more money may be collected from one dealer than another does not destroy the equality or uniformity of the system, within the meaning of the Constitution, but its tendency and effect is decidedly to the contrary. "Perfectly equal and uniform taxation will remain an unattainable good as long as men and government and man are imperfect." Approximation of all that can be had, and this is remitted to the patriotic judgment of the law-making power. Whether a tax is just and equal is not a question of law. If it were, courts, by adopting a standard of rigid construction, might altogether put a stop to the use of any system ever devised, whether it related to a tax on property or on business, or a capitation tax, even in its practical operation bore equally and uniformly on the same class of subjects. Is such equality and uniformity as conforms to the standards provided in the Constitution, or reasonably deducible from it, that can be required. *Texas Banking and Insurance Co. v. State*, 42 Tex. 639; *Youngblood v. Sexton*, 32 Mich. 414; *Cooley v. Board of Wardens*, 124-127. Viewed in its twofold aspect, the law in question is free from objection on this account. It levies a specific occupation tax of \$250 on every dealer in the State, exempting no person or business from its operation, and requires every dealer alike to pay the tax as a prerequisite to his selling, and then, as if anticipating a complaint that the tax ought to have been graduated according to the amount of business done, it introduces that feature also, after a certain amount of sales has been made, and lays the additional burdens on those of the class whose prosperity in business best enables them to bear it. A dealer who fails to bring himself within the latter category, and who, at the time of the prosecution his credit of \$250 had been exhausted, and that the State was in fact collecting from him the money the stipulated excise on each drink sold, it is hardly necessary to determine whether that feature of the law is uniform. But we see no objection to either, or to both as a whole.

The "registers" are a part of the system devised for the calculation of the tax and ascertainment of the amount due. The State has a right to levy and collect an occupation tax according to the amount of business done.

the amount of sales, as we have seen it has, then it was clearly competent for it to adopt a method for the enumeration of the number of drinks, and to require those voluntarily engaging in the occupation to bear the burden of its collection. Had the legislature seen fit, it might have authorized the appointment of an inspector for each bar-room or beer-saloon, and devolved upon him the duty of keeping an account of the sales, instead of employing an automatic mechanism for that purpose. And the additional expense incurred by the system is more justly devolved upon those who may choose to engage in the special calling than upon the general public at large.

With the policy or impolicy of laws, courts have no concern. Their duty is confined to a comparison of the law with the Constitution, and if it violates no provision of the paramount law, and the legislature has not in its enactment transcended the limits fixed by the people in their sovereign capacity, courts are as powerless to correct the evil supposed to follow the enactment of bad laws as the same number of private individuals. If the particular law under discussion is unjust or impolitic, and bears with undue weight upon any particular class of citizens, the remedy is with the people themselves in their political capacity, and not with the courts; and the duty of the latter is ended when they ascertain that the law is within constitutional limitations, whether the enactment was an abuse of power or not.

The judgment of the court below is in all things affirmed.

Affirmed.

COX V. STATE.

(8 Tex. Ct. App. 254.)

Criminal law—indictment—conclusion—"against peace and dignity of the State."

An indictment concluding, "against the peace and dignity of the state," is invalid, the Constitution requiring the conclusion, "against the peace and dignity of the State," although no exception was taken below.

CONVICTION of murder. The opinion states the point.


Lane & Payne, Waelder & Upson, John Ireland and J. W. Stanton, for appellants.

Thomas Bull, assistant attorney-general, for State.

WHITE, P. J. [Omitting other matters.] It is a provision of our Constitution that "all prosecutions shall be carried on in the name and by the authority of 'The State of Texas,' and 'against the peace and dignity of the State.'" Const., art. 10. Our statute also prescribes the requisites to an indictment, of which is "That it shall commence 'in the name and authority of the State of Texas,'" and the eighth, "The indictment must conclude 'against the peace and dignity of the State.'" Dig., art. 2863; Rev. Code Cr. Proc. art. 420. The indictment in this case, both in the copy set out in the transcript, and in the original which we have had before us for inspection, concludes "against the peace and dignity of the *statute*," instead of "against the peace and dignity of the State."

It has been ably argued by the assistant attorney-general that these words are mere words of form — are not a part of the substance of the indictment — were not a matter material to be considered by the grand jury, but were a matter of pleading; that in order to avail of such defect in the indictment should have been taken in the court below, and not having been taken either by exception or motion in the court below, that the verdict has cured the informality, and it cannot be introduced into or taken advantage of for the first time on appeal. We have considered the question has been one of no little embarrassment, and in our research we have spared no pains in hunting up and collecting the authorities where the subject has been discussed and decided in the courts of this country. The difficulty in obtaining the authorities, for some of which we have had to send outside the State, has occasioned the delay in the decision of the case. We believe that we have at length consulted every case in the United States wherein the question has been reviewed, so far as the authorities were accessible.

Our conclusion is that the previous decisions of the courts of this State, which decisions have been controverted in their application to the *status* of this case, are authority in point, and they, agreeing to the view we take of the subject, are abundantly sustained by the great weight of authority which we propose to cite from other sources, and which establishes the proposition that whilst the constitutional requirement is, critically speaking, matter of form, it is also nevertheless matter of substance by virtue of the fact that it is part of the Constitution, no declaratory portion of which



the courts empowered with authority to declare only formal when the language is positive and unambiguous. However much we may feel disposed to consider a matter prescribed by the Constitution ill-advised or useless—however much we may be inclined to doubt the propriety of inserting into the organic, fundamental law of the State requisites of forms with regard to procedure and practice in the courts—the answer is, the people themselves, the source of all power and authority in a republican government, have spoken it; and with regard to their *ipse dixit*, when contained in the Constitution, which is but the expression of their sovereign will, the courts can only bow in humble obedience and say “*ita est scripta.*” If plain and unambiguous, no ordinary rules of construction are applicable to these expressions; their inherent, binding authority is superior to all ordinary rules. As was said by Mr. Justice EMMET, and concurred in by Judge COOLEY: “It will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory and not imperative.” *People v. Lawrence*, 36 Barb. 186; Cooley’s Const. Lim. (3d ed.) 82.

In *State v. Durst*, 7 Tex. 74, the court say: “It will suffice, for the disposition of this case, to observe that it is a positive requirement of the Constitution that the indictment conclude ‘against the peace and dignity of the State.’ Hart. Dig. 62, § 9. It is scarcely necessary to say that the courts have no authority to dispense with that which the Constitution requires.”

In *State v. Sims*, Chief Justice ROBERTS says: “The indictment omitted the conclusion required by the Constitution; ‘against the peace and dignity of the State.’ It was excepted to, and set aside by the court; but not on that ground. That is not one of the exceptions to matters of substance specified in the Code of Criminal Procedure. In the case of *Durst v. State*, it is said ‘the courts have no authority to dispense with that which the Constitution requires,’ in sustaining an exception of this kind made to an indictment. 7 Tex. 74. It has been held to be a fatal defect, whether specially excepted to or not. *State v. Lopez*, 19 Mo. 254; *State v. Pemberton*, 30 id. 376. It is an objection so obvious that if we were in doubt about sustaining it under our Code, it would be useless to send it back to be made in the court below.” 43 Tex. 521. In *Holden v. State*, 1 Tex. Ct. App. 225, it was held that an indictment which did not conclude “against the peace and dignity of the State” was fatally defective.

In *Rice v. State*, 4 Heisk. 215, it was held that "an indictment that does not conclude 'against the peace and dignity of the State' is a nullity. It is a positive injunction of the Constitution that such shall be the conclusion of every indictment. It is therefore a matter that cannot be affected by legislation, and a matter that cannot be ignored by the courts. An indictment without these words is not an accusation of crime, and not an indictment in the sense of the Constitution. No conviction upon such an indictment could be permitted to stand, and a prisoner cannot waive his rights in this respect, as it is the imperative mandate of the Constitution that all crimes shall be prosecuted by presentment and indictment, and that all indictments shall conclude 'against the peace and dignity of the State.'" "This conclusion 'against the peace and dignity of the State' cannot be dispensed with." *Green's Cr. Rep.* 266. The same doctrine is emphatically declared in *Thompson v. Commonwealth*, 20 Gratt. 724, and *Carney's Case*, id. 546.

In *Nicholas v. State*, 35 Wis. 308, the court say: "The Constitution, art. 7, § 7, provides that 'all indictments shall conclude against the peace and dignity of the State.' This formula is a rhetorical flourish, adding nothing to the substance of the indictment, and it is difficult to see why the mandate for its use is asserted in the Constitution. Yet it is there, and must be obeyed. We enforced obedience to it in *Williams v. State*, 27 Wis. 400. Of course the accused cannot be possibly prejudiced or in any way misled by the omission of the formula from the indictment, and its use of it is held necessary for the sole reason that the Constitution ordains that it shall be used."

But a case directly in point, and meeting the positions taken by the assistant attorney-general in this case, is *Lemons v. People*, 10 Va. 755; s. c., 6 Am. Rep. 293, where it was held — the indictment concluding "against the peace and dignity of the State of Virginia" — that the indictment was not sufficient. Further, as stated concisely in the syllabus, "When the Constitution of the State requires an indictment to conclude in certain forms and words, an indictment is not good unless it concludes in the exact language of the Constitution. And a prisoner failing to demur, or moving to quash, or moving in arrest of judgment, on an indictment not in the exact language of the Constitution, cannot be held to waive his right to make objection to the indictment."

appellate court, the right being a constitutional and not a personal right."

In other States, it has been held that the exact words are not necessary if words in substance and of like import are used. *Anderson v. State*, 5 Ark. 444; *Rogers v. Commonwealth*, 5 S. & R. 462; *Yancey v. State*, 1 Const. (S. C.) 237; *Commonwealth v. Young*, 7 B. Monr. 1; *State v. Johnson*, Walk. (Miss.) 392; *Greeson v. State*, 5 How. (Miss.) 33; *State v. Foster*, 61 Mo. 549; *State v. Kean*, 10 N. H. 347; *State v. Washington*, 1 Bay, 120; 1 Am. Dec. 601; *State v. Anthony*, 1 McCord, 182. In *Lopez v. State*, 19 Mo. 244, the conclusion was "against the peace of the statute, and of the statute in such cases made and provided,"—a conclusion very similar to the one in this case, and the indictment was held bad.

We have found but two cases where such defects were held mere matters of form. In *Cain v. State*, 7 Blackf. 612, an indictment concluding "against the peace of the State" was permitted by the court to be amended by the prosecuting officer so as to read "against the peace and dignity of the State." The other case is that of *Commonwealth v. Paxton*, Court of Quarter Sessions of Chester County, Pennsylvania, published in the *Legal Intelligencer* (Philadelphia), November 14, 1879, where it was held that the words "against the peace and dignity of the Commonwealth of Pennsylvania" are words of form and not of substance, and that the fact that they are required by the Constitution makes them no less so.

Our opinion is that the constitutional conclusion is one both of form and substance combined, substance because the Constitution requires it; and may be availed of at any time.

For the reason that illegal and inadmissible evidence was allowed to go to the jury, over objections of defendants, and because the indictment is fatally defective, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

HATCH V. STATE.

(8 Tex. Ct. App. 416.)

Criminal law—new trial—comments of public prosecutor.

On a criminal trial, the public prosecutor, in addressing the jury, designated the defendant as a "fellow," and a "land thief," and "as guilty as he the prisoner having previously been convicted and got a new trial, the prosecutor said the new trial was obtained "by a dodge and technical boasted of his ability to convict him before twelve honest men times as he could get a new trial. The statute forbade any all to former conviction. On account of this language, the defendant being convicted, a new trial was granted, although the trial judge had advised the jury to disregard it.

CONVICTION of forgery. The opinion states the case.

Walton, Green & Hill, for appellant.

Thomas Ball, assistant attorney-general, for State.

WHITE, P. J. When the case here presented was before the former appeal, it was reversed upon three grounds: 1. The refusal of the court to grant the defendant's application for a continuance. 2. The refusal of the court to give in charge to the jury a proper instruction asked by defendant. 3. The overruling of defendant's motion for a new trial. 6 Tex. Ct. App. 384. Each of these errors was deemed by us of vital importance at the time, and a reversal of the rulings upon them, as enunciated in the opinion, only to confirm and strengthen the conviction then entertained, the judgment, on account of the gravity of these errors, was affirmed, and could not and should not have been permitted to stand.

We are led to make these remarks prefatory to a discussion of the main error relied on as ground of reversal of the case on second appeal, and which error is pointed out in defendant's bill of exceptions as follows, after stating the case: "Be it remembered, that during the progress of the trial of the above case, after the evidence had been closed, and after the jury had been addressed by the county attorney, E. T. Moore, and had been addressed by W. M. Walton, N. G. Shelley, and Beverl

had in the case resulting in a reversal, I reproved the co called him to order, and I further directed counsel to spe evidence in the case, and told the jury to disregard an statements made by counsel except as the same related to dence, or such as were the deductions drawn from the ev the case. E. B. Turner, judge presiding.”

Our statutes provide that where a new trial has been aw the Court of Appeals the cause shall stand as it would ha in case the new trial had been granted in the court below Dig., art. 3216; Rev. Stats., Code Cr. Proc., art. 876. A effect of a new trial is to place the cause in the same pos which it was before any trial had taken place. *The former tion shall be regarded as no presumption of guilt, nor sh alluded to in the argument.*” Pasc. Dig., art. 3139; Rev Code Cr. Proc., art. 783.

There can be no mistake as to the meaning of the words the intention of the legislature in prescribing that upon a or new trial in a criminal case a “former conviction s regarded as no presumption of guilt, nor shall it be allude the argument.” Men are oftentimes convicted illegally, contravention of some important right conferred by law, would be not only unjust but inhuman to claim that such viction should weigh a single particle in the estimation of guilt upon another trial. The fact that the former convict been set aside and a new trial awarded, even if done upon g merely “technical,” or upon grounds which in the estima some may appear “foolish,” does not in the slightest alter nor the reason of the rule. Every defense which the law to a party charged with crime, every shield which the State around a citizen when she seeks to hold him amenable to lated law, every right guaranteed to him, are in a certain se to a certain extent “technical,” and may, in the estima some, be mere “stumbling-blocks” in the way of justice, and ishness” in the way of a speedy enforcement of the law, ju doctrines of Christianity at first were to the Jews a stumblir and to the Greeks foolishness. Yet they are rights, never such as a defendant may always take advantage of so lon, law recognizes his right to do so, and any attempt to abri deprive him of them is itself a violation of law, because the much a part and parcel of the law of criminal procedure.

crime defined and punishment denounced. "Hence it is," says Mr. Bishop, "that before any person can be made to suffer for a crime he must be caught and held in the exact meshes which the law has provided; or, in other words, he must be proceeded against step by step, according to the rules of procedure which the law has ordained. It is of no avail to proceed against him according to other and better rules; the law's rules must be pursued, or the law's penalties cannot be imposed upon him for his crime." 1 Bish. Cr. Proc. (2d ed.), § 89.

A defendant has the right to avail himself of every "technical," as well as substantial, right which the law accords him. And "with every disposition on the part of judges to enforce the law," so as to render certain the guilt of those convicted, "the effort frequently fails because something is done or omitted which contravenes some arbitrary or technical right of the prisoner. Courts have no power in criminal cases to affirm a judgment merely because the judges are persuaded that upon the merits of the case the judgment is right. If any error intervenes in the proceeding, it is presumed to be injurious to the prisoner, and generally he is entitled to a reversal of the judgment; for it is his constitutional privilege to stand upon his strict legal rights, and to be tried according to law. And yet it very often happens that the matter of exception taken by him serves no other purpose than to defeat justice." *People v. Williams*, 18 Cal. 187.

In almost nine cases out of every ten, prosecuting officers, carried away by their zeal to convict, are themselves to blame that mere technical errors, sufficient to render necessary a reversal of a cause, are suffered to inject themselves into the proceedings on the trial. A more notable illustration of the truth of this assertion could scarcely be found than that exhibited in defendant's first bill of exceptions, copied above. It may be, as we infer was his opinion from the explanations furnished us by the presiding judge, that the skillful counsel for defendant, by such constant interruptions and objections, had the purpose in view, and were seeking to entrap the able counsel employed in the prosecution by the State into some such intemperance of language and gross violation of the law as was indulged in by him. He should have been on his guard against, and prepared to resist, all such attempts. Instead, however,—and no doubt, as we infer from the learned judge's explanation, by way, it seems to us, of apology for him,—he was by such arts and devices

(which, by the by, his honor should have protected him goaded into a perfect frenzy of irritation, which for the rendered him wholly oblivious or totally reckless of the consequences to follow. Still, this does not extenuate or excuse the error. for the defendant, though such a course is not to be commended, can scarcely be blamed if by such means, when permitted in court, they are enabled so easily to succeed in the accomplishment of their intended purpose. An attorney for the defense has the right, when permitted to do so by the court, to use all the means at his power, consistent with law and professional propriety, to obtain his client's acquittal. Mr. Bishop says: "There is no litigation resting on man, than that which sometimes compels a man to use his legal powers for the defense of one whose course he loathes, and whom he deems guilty of the very crime of which he seeks to obtain an acquittal. The right of every person to remain unpunished until not only the crime has been committed, but he has been formally convicted of it, after making every defense any other person is entitled to make, is one of the main pillars on which rest our liberty, and our security in the pursuit of happiness." 1 Bish. Cr. Proc., § 309.

It was the duty of the court to protect the prosecuting officer from such frequent and unnecessary interruptions of counsel to the extent of using his full power in the premises if necessary to prevent it. But here it does not appear either that the court claimed or the court interposed to protect him from the interruptions. That counsel for the defense had the right to make and reserve a bill of exceptions to any argument made by the prosecuting officer upon facts not in evidence, will not, we suppose, be for a moment questioned. This is all which the bill of exceptions discloses he was proposing to do, when the vehement and vituperative language complained of was indulged in with regard to the former trial and conviction. The judge says that when allusion was made to the former trial he reproved counsel and called him to order. This, however, does not appear to have had the desired effect, if indeed any effect at all; on the contrary, he reiterates and reiterates what he has already said, and adds language much more reprehensible, if possible, in his denunciation of the prisoner and the former reversal of his case, and again and again tramples under foot the statute, which, as we have expressly prohibits any and all such allusions.

This statute either means something or it means nothing. If it means any thing, then its violation is an injury done to the rights of the defendant, for which the judgment in this case should and must be reversed.

It was said by the court in *Tucker v. Henniker*, 41 N. H. 317 :
 ‘ It is irregular and illegal for counsel to comment upon facts not proven before the jury as true, and not legally competent and admissible as evidence. The counsel represents and is a substitute for his client; whatever therefore the client may do in the management of his case may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.

“To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentiment is contempt. * * * When counsel are permitted to state facts in argument and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied.”

And so in *Brown v. Swinesford*, 44 Wis. 232; s. c., 28 Am. Rep. 582, the following appropriate language upon this subject is used by the court:

“The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at the best, that all that can be said for each party, in the determination of fact and law, should be heard.

Forensic strife is but a method, and a mighty one, to ascertain truth, and the law governing the truth. It is the duty of counsel to make the most of the case which his client gives him; but counsel is out of his duty and his right, and out of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. True it is that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client that it is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than at the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even appeal to his client's prejudices against his adversary, as far as they relate to the facts in the case. But he has neither the duty nor the right to appeal to prejudices, just or unjust, against the adversary in the very case he has to try. The very fullest freedom of argument within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the case basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof."

We might cite many other authorities to the same effect, but we will content ourselves with making the following extract from the opinion of our Supreme Court in *Thompson v. State*. Mr. Justice commenting upon the character of discussion indulged in by the district attorney in his concluding address to the jury, says: "We deem it, however, of sufficiently grave importance, and so objectionable, as to require the decided condemnation of the State in behalf of their client or desire for success should induce counsel in civil causes, much less those representing the State in criminal cases, to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case, and the conclusions legitimately deducible from the law applicable to them." 43 Tex. 268.

We do not propose to discuss any of the other errors complained of, they not being in our opinion of vital or material importance. The first portion of the charge of the court, in so far as it relates to the making and forging of the instrument, may be calculated to confuse and mislead the jury, though in applying the law di

to the case the court did limit their investigation to the charge of uttering the forged instrument, that being the crime for which the State claimed a conviction. Art. 439, Penal Code, is hardly applicable to a charge of uttering a forged instrument.

The judgment of the court is reversed and the cause remanded for a new trial, because of the character and course of argument indulged in by the counsel in the closing address to the jury.

Reversed and remanded.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

CALHOUN V. WILLIAMS.

(38 Gratt. 18.)

Exemption — homestead — "householder or head of a family."

An unmarried man, keeping house and having his farm hands living with him but having no children or other persons dependent on him living with him is not a "householder or head of a family" entitled to a homestead exemption.*

SUIT to subject land to a judgment. Defense of homestead exemption. Defendant was unmarried, a farmer, and kept house, but had no person living with him except his farm hands. The plaintiff had judgment below.

A. G. Pendleton, for appellant.

Gilmore & Penn, for appellee.

ANDERSON, J. The homestead article of the Constitution of Virginia has been judicially construed, both by the Federal and State courts, to confer a personal privilege upon the "householder or head of a family," and the question and only question in this case is, Is the appellant who claims the benefit of this provision

* See *Race v. Oldridge* (90 Ill. 350), 32 Am. Rep. 27 and note, 30.

correspondence by letter. What is more usual than to send of regard or affection by the writer to the household? Such are universally meant for the family—the inmates of it. And if they constitute the household, who can be meant “householder” but the “head of the family?” But to hold that by the “householder” is meant the head of a family do not mean to say that every head of a family must be, and is, a householder.

But the whole scope of the article shows that the privilege was intended not so much for the benefit of the person to whom it is given, as for the benefit of his family; to enable the person to whom it is given to use it to save his family from suffering and distress. For this end, it was necessary that the head of the family should have the power to shield a portion of his property from levy under execution or distress, or other process. In *Shipe v. Gratt*, 28 Gratt. 716, 733, Judge STAPLES remarked “that no one can fail to see that the provision of our Constitution, and the adjudication of other States, and fail to see that the primary object is to protect the family. As was said by the Supreme Court of *Sears v. Hanks*, 14 Ohio St. 498, 501, the humane policy of the homestead act seeks not the protection of the debtor, but to protect his family from the inhumanity which would result to its dependent members of a home.”

That such was the intention of the framers of our Constitution to this end, to confer the privilege upon a person who had a family, and not upon the mere occupier of a house, I think is shown by the 5th section of the article, which provides that the general assembly “shall prescribe in what manner, and under what conditions, the said householder or head of a family shall hold after set apart and hold for himself and family,” etc., “and in its discretion determine in what manner and on what conditions he may thereafter hold for the benefit of himself and family.” I think this language plainly shows that the householder intended was one who had a family.

Indeed, the whole theory and policy of the homestead act is upon the principle that there is a natural and moral obligation upon the head of a family to provide for the support of his children and other persons dependent on him, toward whom he stands almost *in loco parentis*, which is, if not paramount to his obligation to pay his debts. Whether it is sound in

not, is not the question. It is evidently the ground upon which the homestead was made a constitutional provision, as I think the debates in the convention which framed it will show.

The family may consist of a wife and children, or of other persons, who may stand in a state of dependence in the family relation; or it may consist of persons standing in either of these relations to the head of the family, whether the father, or mother, or a brother, or a sister, or other relation, is the head; but they must be persons who are dependent, in some measure, on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution, or other process, and who would be benefitted by its exemption.

The foregoing view I think is supported by a fair and liberal construction of the homestead article of the Constitution, according to the intent of its framers, as gathered from its language and its general scope, and the object sought to be attained. And it is in harmony with the adjudications on the subject. In *Bowen v. Witt*, 19 Wend. 475, the court said "the statute declares that the following property when owned by any person being a householder shall be exempt from execution," etc., and in determining what was meant by the word "householder" in that statute, said it "means the head, masters or person who has the charge of, and provides for a family."

The terms "householder," and master, or chief of a family are used interchangeably, as meaning the same thing. In *Thompson on Homestead*, § 66, it is said "If a person professes the character of a householder—that is, if he is the master or chief of a family, he does not lose it by his temporarily ceasing to keep house."

The Constitution of Georgia, adopted in 1868, guarantees a homestead to each "head of a family," or guardian, or trustee of a family of minor children. And the Supreme Court of the State held, that a single man, having no person dependent on him for a support, is not within the meaning of this provision "the head of a family." *Thompson on Homestead and Exceptions*, citing *Lynch v. Pace*, 40 Ga. 173. What constitutes a family was considered with reference to the Texas Constitution of 1845 and 1866, providing for the exemption from forced sale of property of "all heads of families," etc. It was held that the term family was used in its generic sense, embracing a household composed of parents and children, or other relatives, or domestics and servants; in short

every collective body of persons, living together within curtilage, subsisting in common, directing their attention upon a common object — promotion of their mutual interests and so on. Id. § 44, citing *Wilson v. Cochran*, 31 Tex. 677.

The duty to support is also made the test. He upon whom the law imposes such a duty, growing out of *status*, and not out of contract, and the persons to whom he owes this duty, if dwelling together in a domestic establishment, constitute a family of which he is the head. Id. § 45, citing *Whaler v. Cadman*, 11 La. 100; *Marsh v. Lasenby*, 41 Ga. 153; *Sallee v. Waters*, 17 Ala. 400; *Sanderlin v. Sanderlin's Adm'r*, 1 Swan, 441. The writer thinks the courts have adopted the more humane rule, that a moral obligation on the managing member of the domestic association to support others, or some of them, will be sufficient to constitute the family, and the manager of it the head of a family.

There are cases which say that to constitute a family within the meaning of such statutes there must be a condition of dependence and not a mere aggregation of individuals. Id. § 46.

The relation of master and servant, or more properly speaking of employer and employee, as it ordinarily exists in this country, does not constitute a family. And therefore a single man, with no other persons living with him than servants and employees, is not the head of a family, within the meaning of statutes relating to homestead exemptions. Id. § 47, citing *Garaty v. Du Bose*, 493; *Calhoun v. McLenden*, 42 Ga. 405. The adjudication of the States of the Union, to which I have referred, are taken from the citations of Mr. Thompson's works on Homesteads and Exemptions, not having access here to the books in which the cases are reported. Although I do not mean to express any difference in all they say, I rely upon them so far as they agree with the views I have presented in relation to the constitutional homestead provision.

It now only remains briefly to apply these doctrines to the case in hand. Was the appellant a "householder" or "head of a family" in the sense in which those terms are used in the Constitution?

He had lived upon his own land for about eighteen years, and was never married. On the 17th of February, 1858, his father and mother conveyed to him a tract of one hundred acres of land in consideration that he would support them during their lives; and they soon after left their own house, and came

with him. But both of them died, and he occupied the house alone, no one living with him except his employees. He claims the right to hold his property as a homestead, which he values at \$1,680—probably all he owns—and which is a very low valuation, if his estimate of the value of the land is proportioned to its real value, in the same ratio of his estimate of his personal property to its real value. He, an unmarried man, without a family to provide for, and no one dependent on him for support, seeks to hold all this property under the homestead, to avoid the payment of an honest debt of the inconsiderable amount of \$115, and interest on it from the 16th of November, 1874, and \$7.20 costs. I agree with the judge of the Circuit Court of Smythe county, that it cannot be done—that the homestead was not designed to enable a man who had neither wife, nor children, nor others dependent on him, to withhold his property, on the faith of which he had contracted a debt, from its payment, which he was in common honesty bound to pay; and thus to take his neighbor's property, or services, under a promise to pay for them, and then force him to lose them, although fully able to pay for them. For such an act he cannot offer the plea, upon which the right of the homestead is claimed, that he has a wife, or children, or a family of poor and needy persons, who are dependent on him, and have claims on him, and for whose support a moral obligation rests on him.

He can make no such plea; and therefore the homestead provision was not designed for him. For the care of a widow who is childless and lives alone, whose husband died without having a homestead assigned to him in his life-time, we refer to chapter 183 of the Code of 1873, § 10; not intending now to indicate any opinion as to the proper construction of said section, as no question arises upon it in this case.

In reaching our conclusions, we have not been unmindful of section 7 of the homestead article of the Constitution, which requires that the provisions of said article "shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out;" and have endeavored to give such a liberal construction to it as will give effect to the intention of its framers.

For the foregoing reasons, I am of opinion to affirm the decree of the Circuit Court, with costs.

The other judges concurred.

Decree affirmed.

GRUBB'S ADM'R V. SULT.

(23 Gratt. 308.)

Action — for breach of marriage promise against promisor's administrator.

An action for breach of promise of marriage will not lie against the representative of the promisor.*

ACTION against the administrator of Isaiah F. Grubb, for a breach of promise of marriage, made by the deceased to the plaintiff in his life-time. No special damages were claimed. The defendant demurred, but the court overruled the demurrer, and the plaintiff had a verdict and judgment.

G. J. Holbrook and R. C. Kent, for appellant.

J. H. Gilmore and C. B. Thomas, for appellee.

STAPLES, J. The only question to be decided in this case is whether an action for a breach of promise of marriage lies against the personal representative of the promisor.

The counsel for the defendant in error insist that at common law the personal representative may sue and be sued upon contracts of the deceased, especially where the breach has been committed in the life-time of the parties, and that a contract founded upon a promise of marriage is no exception to the rule. They further insist that if they are mistaken in this view and the action is not maintainable according to the rules of common law, it is so provided for by statute.

These two propositions may be considered in the order in which they are stated. At common law, if an injury was done to the person or property of another, for which damages could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done. In other words, where the action imputed a tort to the person or property of another, a plea of *non est* must have been not guilty, the maxim was *actio perit cum persona*. According to the earlier authorities, the maxim of the common law is only to be understood of a tort.

* See *Price v. Price* (75 N. Y. 244), 31 Am. Rep. 463.

had no application to causes of action arising upon contract, especially if broken in the life-time of the decedent.

The proposition that the personal representative is liable upon every contract of the deceased was, however, always to be understood as not applying to those cases in which the damage consisted in the personal suffering of the deceased, or in a personal wrong done by him, unless, indeed, some injury to the personal estate could be stated on the record. So that whenever the injury is merely personal, whether resulting from breach of contract or from tort, the maxim, *actio personalis moritur cum persona* prevails. 2 Williams on Exra. bottom pp. 786, 787-790; 4 Minor Inst., Part I, pp. 793-4; Broom's Leg. Max. side pp. 907, 908, 909, 910; Whart. Legal Max. 19.

One of the earliest cases on this subject is that of *Chamberlain v. Williamson*, 2 M. & S. 408, in which it was held that an administrator cannot maintain an action for a breach of promise to the plaintiff's intestate where no special damage is alleged. This case has always been recognized as a leading one. Lord ELLENBOROUGH took time to examine the decisions, and afterward delivered a carefully prepared opinion. He said "the action was novel in its kind, and not an instance had been cited or suggested in the argument or its having been maintained, nor had he been able to discover any by his own researches or inquiries; and yet frequent occasions must have arisen for bringing such actions." He further said, "executors and administrators are the representatives of the temporal property—that is, the debts and goods—of the deceased; but not of their wrongs, except where these wrongs operate to the temporal injury of the personal estate." Where the damage done to the personal estate can be stated on the record, that involves a different question. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage consists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased, such as arise out of the unskillfulness of medical practitioners, the imprisonment of a party brought on by the negligence of his attorney—all these would be breaches of the implied promise by the persons employed to exhibit a proper skill and attention. He was not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case.

This opinion of Lord ELLENBOROUGH was delivered sixty years ago. The researches of counsel have not in case during all the intervening period controverting the conclusions in *Chamberlain v. Williamson*. On the other we have the opinions of all the commentators and text-writers the decisions of several courts of the highest respectability, fully sustaining the case of *Chamberlain v. Williamson*. One of these is *Stebbins v. Palmer*, 1 Pick. 71; 10 Am. Dec. 151, in which it was expressly held that an action for breach of promise of marriage does not survive against the administrator of the estate where no special damage is alleged. The Supreme Court of Massachusetts, after quoting the language of Lord MANSFIELD in *v. Trott*, Cowp. 376, goes on to say: "The distinction seems to be between causes of action which affect the estate, and those which affect the person only; the former survives for or against the executor, the latter die with the person. According to these distinctions, an action for the breach of promise of marriage would not survive, for it is a contract merely personal; at least it does not necessarily affect property. The principal ground of damages is disappointment; the injury complained of is violated faith, more resembling in substance, deceit and fraud than a mere common breach of promise. The damages may be, and frequently are, vindictive if they could be proved against the executor, might render the estate insolvent, to the loss and injury of creditors. For these and other reasons, it has been settled in England that such an action does not survive for an executor. If this was rightly settled, it is decisive, for the law is unquestionably the same whichever party may die."

The case of *Smith v. Sherman*, 4 Cush. 408, involved identical the same question, and was decided the same way, Chief Justice SHAW delivering the unanimous opinion of the court.

In *Lattimore v. Simmons*, 13 S. & R. 183, substantially the same question was involved and the same conclusion reached as in the Massachusetts decisions. In that case, however, the action had been brought in the life-time of the contracting parties, the defendant having died during the pendency of the action, the question was whether it survived against his executors.

TILGHMAN, C. J., in delivering the opinion of the court said: "The counsel for the plaintiff rely on the contract in the case and on some general dicta that all actions founded on contract survive."



tributees. It would certainly be the first instance on record of an action prosecuted by one personal representative against another for the recovery of mere vindictive damages as assets for the benefit of creditors.

In the case of *Dillard v. Collins*, 25 Gratt. 343, this court held that a right of action, which is merely personal and dies with the party, is not transferred to an assignee in bankruptcy; that the assignee in many respects stands in the same relation toward the bankrupt's estate as that of an executor toward the personal estate of the testator. The distinction was there taken between rights of action for torts to the person, which do not survive, and rights of action for injuries to property, which do survive. The former, it was said, do not pass to the assignee. But if the proposition now contended for be correct, a right of action founded on a breach of promise of marriage would pass to the assignee in bankruptcy, and be the subject of a suit against a personal representative for the benefit of the bankrupt's creditors.

As was said by Lord MANSFIELD in *Hambly v. Trott*, Cowp. 376, all public and private wrongs die with the offender. And this was pre-eminently a wise rule of the common law, founded on considerations of the soundest public policy. In actions based upon torts to the person, such, for example, as slander and breach of promise of marriage, the motives and feelings of the parties are often involved, every thing relating to their character and conduct is the subject of investigation. Sometimes the chastity of the plaintiff is assailed with every circumstance of aggravation; and on the other hand, the bad faith of the defendant is made the occasion of the severest animadversion. In this class of cases, not unfrequently, the most private and sacred family relations are unveiled and exposed to public gaze and criticism. The common law wisely proceeded upon the maxim that with the death of either party these investigations should cease, and when the injured party is dead, no pecuniary damages can compensate for violated faith, wounded pride and outraged feelings, and that the courts should never become the arenas for unseemly controversies involving the reputation and the feelings of those who are in their graves.

The legislatures and the courts have wisely adhered to this rule through all the innovations of modern times. There may be exceptional cases — cases of undoubted hardship; but the rule is found to be generally wise and salutary in its operation.

The learned counsel for the defendant in error has depicted eloquent and forcible language the injury often resulting from breach of promise of marriage, loss of position and health, and unfrequently pecuniary ruin; and for these injuries it is said the party aggrieved ought not to be deprived of compensation by the death of the offender. The argument of the learned counsel with much greater force applies to cases of slander and libel, malice, prosecution and false imprisonment, which often involve injury to character, station and health, as also loss of fortune.

In all this class of injuries it may be said the injured party should not be denied redress because the offender may die, in many cases this would be perfectly true. But no one so far thinks of changing the law on the subject; because all understand that such a change would be productive of far greater mischief than benefit.

In the State of New York they have a statute substantially the same as ours, which was the subject of consideration in *N. Y. Kalbfleisch*, 58 N. Y. 282; s. c., 17 Am. Rep. 250. It was held that an action for a breach of promise of marriage is an action upon a contract within the meaning of the statute, and cannot be revived against the personal representatives of the promisor. CHURCH, C. J., in delivering the opinion of the court, said: "Wrongful acts for which this statute authorizes an action to be brought by or against executors are such as affect property or personal rights and interests; or, in other words, such as affect the rights of executors represent property only. They can take only such rights of action as affect property, and cannot recover for injuries for personal wrongs. Although, in form, it resembles an action on contract, in substance it falls within the definition of the statute as an action in the case for personal injuries."

These views of the highest court of the State of New York upon the construction of a statute like our own, upon a question of this sort, are deservedly entitled to great respect. Upon a doubtful question they would be decisive of the case.

In considering this question, we have not deemed it necessary to inquire whether our statute was designed to provide for cases not reached by the common law, or is simply declaratory of the common law. Because in either aspect, cases of breach of promise of marriage are not embraced by its provisions.

It was asked in the argument what possible use or benefit is

GERST V. JONES.

(32 Gratt. 518.)

Sale — implied warranty — article to be manufactured — measure of

Defendant agreed to furnish plaintiffs as many boxes as they should pack manufactured tobacco during a certain season at a specified price. It is customary for tobacco dealers to require manufacturers of boxes for the selection of proper material and for the boxes received to ascertain if they are suitable. The boxes furnished defendant were of unseasoned wood, which caused the tobacco therein to mould and deteriorate in value. *Held*, (1) that the defendant was liable as upon an implied warranty, that the boxes were suitable for the purpose of packing manufactured tobacco for loss from their not being so, and (2) that the measure of his liability was the damage done to the tobacco by its moulding.

ACTION to recover for loss occasioned by defendant furnishing to plaintiffs unsuitable boxes in which to pack tobacco manufactured by them. Plaintiffs recovered judgment below. Opinion states the facts.

E. E. Bouldin, for plaintiff in error.

Ould & Carrington and *Cabell & Peatross*, for defendant in error.

STAPLES, J. The plaintiffs in the court below were manufacturers of tobacco in the town of Danville, and the defendant at the same time engaged in the business of manufacturing and pressing manufactured tobacco. The defendant agreed to furnish plaintiffs for the year 1870, during the manufacturing season, as many boxes as the latter would need, at the price of sixty-five cents per box. In accordance with this arrangement defendant furnished the plaintiffs all the boxes they needed in the year 1870. They pressed their manufactured tobacco in these boxes, and shipped a large portion of it to their commission merchants in New York. Of the tobacco so shipped, one hundred and sixty boxes, containing about ten thousand pounds, was moulded in consequence of unseasoned timber having been used in making

boxes, and eight thousand
found on examination
plaintiffs' damage are
per pound.

It is not claimed
boxes, or that he knew
which they were or
timber used in making
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Welsby, 399 ; Benjamin on Sales, § 657, and cases cited ; Story on Sales, § 372 ; 1 Smith's Lead. Cases.

The case of *Brown v. Edgington*, 2 Man. & Gran. 279, is one of a contrary character. There the plaintiff, being in want of a rope for the purpose of raising pipes of wine from his cellar, the defendant undertook to supply a rope for the purpose, but furnished a defective one, and the plaintiff brought his action for the damage sustained by the breaking of the rope and the consequent loss of a cask of wine. It was held that the defendant was liable upon the implied warranty. And where copper sheathing was ordered for the purpose of sheathing a vessel, to be manufactured by the seller, and it proved to be worthless for any such purpose, it was held that as the seller knew the purpose to which it was to be applied, a warranty was implied on their part that it was for the purpose intended. *Jones v. Bright*, 5 Bing. 533 ; 3 Moore & Payne, 155 ; Story on Sales, 376.

One of the most recent and best considered decisions on this subject is that of *Jones v. Just*, L. R., 3 Q. B. 197, MELLOR. J., in delivering the judgment, reviewed the decisions with great clearness and ability. Among other things, he said, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment and skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such case, the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own. See Benjamin on Sales, § 655, and numerous cases cited in notes.

These principles are decisive of the case in hand. The transaction was not a sale of an existing chattel selected by the plaintiffs, but an executory contract to manufacture and deliver, from time to time, as they might be needed, a number of tobacco boxes for a particular purpose known to the defendant. The defendant, in undertaking to furnish the boxes, impliedly agreed they should be reasonably fit for that purpose. Had the plaintiffs gone to the defendant's factory, and themselves selected certain boxes, such as they believed would answer their purposes, it is very clear the defendant would not be liable, however worthless the boxes might be because the plaintiffs in that case must have relied on their own skill and judgment exclusively. But the plaintiffs made no selec-

tion, with what propriety are the plaintiffs to be charged with negligence in failing to discover it? In cases like the present, the question is not whether the purchaser has an opportunity of examining the article, but whether he has, in fact, examined it for himself, and whether the defect be one readily discoverable upon inspection. He is not bound to examine, for he has the right to rely upon the judgment of the seller, and to take it for granted the latter has furnished an article answering the terms of the contract. 4 Chit. on Cont., § 633; Story on Cont., § 834; *Rodgers v. Niles*, 11 Ohio St. 48. In this case, the plaintiffs clearly acted upon that presumption, and they are not chargeable with negligence in so doing. They have, therefore, a right of action against the defendant for the breach of warranty.

The next question is as to the extent of their recovery. As already stated, the plaintiff's tobacco was damaged to the extent of nine cents per pound by the mould resulting from the use of unseasoned timber in the boxes furnished by the defendant, and upon this estimate the finding of the jury is based. It is insisted that the defendant cannot be held responsible for this damage, which is merely consequential; that the measure of his liability is simply the difference between the actual value of the boxes and what they would have been worth had they conformed to the warranty.

Now, it is easy to see that if this measure of recovery be adopted, the plaintiffs are not entitled to any thing. For if we look merely to the value of the boxes, without reference to the injury of the tobacco, the plaintiffs have, in fact, sustained no loss. Had they purchased from the defendant a machine intended for a particular purpose, which proved entirely worthless, no difficulty would occur in ascertaining the difference between a good and a bad machine, and fixing the loss accordingly. But here, apart from the injury to the tobacco, the plaintiffs have sustained no damage, because the boxes as made answered all the purpose intended as fully as if they had been constructed of the best material. It is not to be supposed that such a result was in the contemplation of the parties at the time they made the contract as the probable consequence of its breach.

It is well settled, that the plaintiff is entitled, as a general rule, to recover such damages as are a natural and proximate result of the wrongful act of the defendant. *Peshine v. Shepperson*, 17 Gratt. 472, 485.

Numerous cases hold that, in an executory contract of sell an article for a particular use, if the article is not fit for use the purchaser is entitled to indemnity for the loss, and non-performance of the contract has occasioned him, the loss is the natural consequence of the breach complained of.

Thus, in *Brown v. Edgington*, already cited, where the defendant sold the plaintiff a rope to be used in raising heavy weights, it was held that the plaintiff was entitled to recover the value of the rope and consequential damages for the loss of a cask of wine and lost from a defect in the rope.

The case of *Boradale v. Brunton*, 2 Moore, 582, was decided for a breach of warranty in the sale of a chain cable. The defect in the cable, an anchor of the plaintiff, to which it was attached, was lost. It was held the plaintiff was entitled to recover the value as well of the lost anchor as of the cable.

It is, however, useless to multiply citations in support of this doctrine. The cases on the subject are very numerous, and may be found in Field on Dam., note to § 278; Benjamin on Dam., 993, and notes; *Smeed v. Ford*, 102 Eng. C. L. 600; *Parker v. Thorburn*, 34 N. Y. 634, and the authorities there cited.

These decisions, and the principles they announce, I think fully sustain the plaintiffs' right to recover special damages for injury to their tobacco, as the natural and proximate result of the defendant's failure to comply with his contract. If the defendant did not intend to be bound by the rule of law which holds that there is an implied warranty, he ought so to have provided, and to have thrown the plaintiffs upon their guard.

That rule, as was said by PARK, J., in *Jones v. Bright*, 533, is of great importance, because it will teach manufacturers that they must not undersell each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold.

[Omitting minor points.]

Judgment affirmed.

The other judges concurred.

NASH V. FUGATE.

(22 Gratt. 593.)

Bond — surety — conditional delivery.

A bond signed by a principal and several sureties, and complete and perfect on its face, except that several scrolls below the signatures of the sureties were left unsigned, was delivered by the sureties to the principal on condition that he should obtain the execution of additional sureties before delivery to the obligor. He delivered it without obtaining such additional sureties. *Held*, that the sureties were bound unless the obligee had notice of the condition, and that the unsigned scrolls were not sufficient to put him on inquiry.*


ACTION on a bond. Among others were the following pleas:
The defendants say the plaintiff his action against them ought not to be maintained, because they say before they signed said writing obligatory their co-defendant, A. W. Smith, had drawn the body of it, and in the presence of the plaintiff made a great many scrolls to it for obligors to sign, and in this imperfect and incomplete condition, with his own name signed as principal obligor, brought it to these defendants, respectively, at different times and places, and then and there represented to them, respectively, that if they would respectively sign to become bound as his sureties to the plaintiff, with as many more solvent sureties as would fill up the scrolls affixed thereto, that he, the said A. W. Smith, would not use it or deliver it to the plaintiff until and unless he procured solvent sureties with these defendants to sign their names opposite each scroll in the said paper affixed, and become bound with them thereby.

And these defendants further say that on this express contract and condition they, respectively, and at different times and places, as the paper was presented to them, respectively signed it, and in its unfinished condition handed it to said Smith to have perfected by having it signed by other solvent persons as aforesaid. And the defendants further say that afterward, to wit, the — day of —, 18—, the said A. W. Smith, in the imperfect and incomplete condition the said paper was in when the last of these defendants

* See *Cutler v. Roberts* (7 Neb. 4), 29 Am. Rep. 371, and note, 377.

signed it, and with a great many scrolls on the paper be names that no names of obligors were signed to, and in violation of the conditions aforesaid on which these defendants were fraudulently delivered it to the plaintiff, and in its imperfect and incomplete condition, to wit, with the said Smith's and the defendants' names signed to it only, and a great many scrolls written to it as aforesaid for other obligors to sign below the defendants' names, to which no names of obligors were signed, the plaintiff wrongfully and fraudulently accepted and received the same, and before these defendants further say the plaintiff at and by the delivery of said supposed writing obligatory to him had no authority, and these defendants had signed it to become bound thereby on the condition that other solvent persons with themselves should sign their names on the vacant scrolls below their names, and become bound with them thereby, who had not done so; wherefore they say the said supposed writing obligatory is not their act and deed.

The seventh plea is as follows: The defendants, etc., etc., say the plaintiff, his action against them should not maintain, because they say A. W. Smith procured them to sign and deliver the said writing sued on to him to get other obligors to sign the following contract and agreement, made and entered into between said Smith and these defendants, to wit, that the defendants would and did sign said writing as sureties for said Smith on the express condition that it was not to be obligatory on these defendants, or either of them, and was not to be delivered by said Smith to the plaintiff as the bond of these defendants, but either one of them, unless and until said Smith procured many more solvent persons, to wit, a number sufficient with them to make twenty — to sign it and become bound with them as co-sureties for said Smith in said supposed writing obligatory; and these defendants say that on this condition only they to become bound to the plaintiff and none other, and on the condition they signed it and put it in said Smith's hands to be signed by a number of other persons he agreed should sign it, and the defendants say they never did acknowledge or deliver said paper to the plaintiff, and never agreed it should be done by the said plaintiff except on the conditions aforesaid, yet they say the said plaintiff wrongfully and without authority from the defendants, delivered to the plaintiff said supposed writing obligatory, without ever procuring any others to sign it with them as co-sureties.



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were to sign, in order to give effect to the bond? It is a circumstance to be considered, in connection with other facts, showing that the obligee had actual knowledge of the act, but of itself is not sufficient to put him upon inquiry, or to create a suspicion of the existence of such an agreement. The scrolls may indicate that at the time the instrument was executed the obligee required that number of securities, or that the obligor expected or intended to procure them. Sometimes the bond is prepared by the obligee himself, and sometimes by the principal obligor.

Upon a contemplated loan of money or sale of property, often, as otherwise, the number of seals is purely accidental, attached to the writing simply with the view of procuring a sufficient number of obligors to make the security satisfactory to the lender. That object is effected, not unfrequently, with fewer seals than there are scrolls, and the obligee, being content with the security, accepts the bond without a suspicion that the principal obligor, in delivering it, is violating any agreement or transgressing his authority.

In the case of personal representatives, and other fiduciaries, also commissioners for the sale of lands and the investment of funds under decrees of court, this sort of transactions are a frequent occurrence. Indeed, throughout Virginia the practice is common among all business men of accepting such securities without a suspicion of any informality in them. It is impossible to foresee the inconvenience and mischief that will ensue if the Court should establish the doctrine that the mere existence of more seals upon a bond without names opens the door to parol agreements or alleged agreements between the several principals — principal and sureties — which will invalidate the bond in the hands of such sureties, in the hands of an innocent holder. And it is a fact of observation, that the researches of counsel have not produced a single case sustaining their doctrine. See *Williams v. Spring*, 384, and cases there cited.

For the reasons already stated, I think the bond in controversy is apparently a complete and perfect obligation, with nothing on its face to indicate that other persons were to sign it to make it effectual as to those who did sign it. It follows that the Court erred in giving the seventh instruction asked for by the defendant.

The proposition laid down in the sixth instruction is now to be considered; and that is a bond apparently perfect and complete may be avoided by parol proof, that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it in order to make the instrument effectual as to those who did sign it.

The counsel for the plaintiff maintains that such proof is inadmissible under the well-established rule of law that parol testimony cannot be received to invalidate or affect a written contract. In this connection, the counsel rely mainly upon the case of *Miller v. Fletcher*, 27 Gratt. 403, in which it was held that where a deed, perfect on its face, is delivered by the obligor directly to the obligee, it is not competent to prove by parol evidence that the delivery was upon a condition which has not been complied with; and it matters not that the obligee is fully apprised of the condition at the time. And learned counsel insist that there is no substantial distinction between a delivery directly to the obligee by all the parties signing the paper and a delivery by part of them to the principal obligor and by the latter to the obligee. In either case, the delivery is absolute and the condition void.

A moment's reflection will, however, show there is a wide distinction between the two cases. A deed cannot be delivered as an escrow to the party on whose behalf it is made; no matter what may be the form of the words used, the delivery is absolute, and the deed takes effect immediately. An escrow, on the other hand, *ex vi termini*, is a deed delivered to some third person, a stranger, to be by him delivered to the grantee, upon the performance of some condition. When the books speak of the delivery to a stranger as an essential to an escrow, it is in contradiction to a delivery to the party in whose behalf the deed is made. Thus in Sheppard's Touchstone, vol. 1, pp. 58-59, it is said, the deed must be delivered to one that is a stranger to it and not to the party himself to whom it is made.

One of the reasons of this rule is said to be, "The delivery to the party is sufficient without the speaking of any words; and when the words are contrary to the act, which is the delivery, the words are of no effect." This reason has obviously no sort of application to the case of a surety who makes a conditional delivery to the principal obligor. The principal in such case is not the agent of the obligee but of the surety, who intrusts the bond to the principal on the

faith of the latter's representation. If the delivery to or an entire stranger to the instrument is consistent with its would seem that the delivery to a co-obligor is equally so. though the latter is a party, he is not the party to whom th made. A delivery to a co-obligor without words will give effect to the instrument than to a stranger without words. *State Bank at Trenton v. Evans*, 3 Green (N. J.), 155.

There are cases, however, that hold that a bond cannot be delivered to a co-obligor as an escrow. One of those is the note of *Millett v. Parker*, 2 Metc. (Ky.) 608; and the reason given is, that while it remains in the hands of the obligor it poses no obligation whatever; whereas, an escrow is so far from the party who has delivered it that he cannot revoke it. This view is controverted by Judge JOYNES in *Ward v. Churn*, 18 801, 814. It is not important now to inquire which of these is correct, as the point does not affect the decision of the question here. In *Millett v. Parker*, the court, after an elaborate discussion of the principles governing the conditional delivery of a deed, said: "If the obligee had been apprised of the existence of the condition, he would have acted in bad faith in accepting the bond when it was offered to him by the principal obligor; but ignorant that any such agreement had been made by the obligor, he had the right to presume that the instrument had been prepared for his acceptance, and that the obligor who had it in his possession was authorized to deliver it to him."

That case concedes, as will be observed, that a bond, conditional on its face, delivered to a co-obligor on a condition that had not been complied with, may be avoided in the hands of an obligee, if he has proof he had notice of the condition.

There are two classes of cases widely dissimilar in the doctrine they hold on this question. On one side it is held, that if the principal deliver a bond to the obligee, perfect on its face, upon a condition not performed, and the latter in violation of the agreement delivers the bond to the obligor, the sureties are not bound, although the obligee may not be apprised of the condition. On the other hand, there are numerous cases which hold that such an instrument cannot be avoided in the hands of the obligee where it appears he was not informed of the condition at the time he received the bond. And so this court held in this case, when it was before us on a previous occasion.

That decision was not based upon any idea of the incompetency of parol testimony to establish the facts; but upon the ground that the surety having intrusted the bond to the principal obligor, the obligee had the right to infer that it was for the purpose of delivery; and the surety was estopped to set up a limitation upon the power of the principal unknown to the obligee. See also *Dair v. United States*, 16 Wall. 1.

There are no cases — certainly none I have seen — which hold that parol testimony is inadmissible to establish the notice as well as the conditional delivery to a co-obligor. There are, however, a multitude of decisions which expressly, or by strong implication, recognize such testimony as admissible. *State v. Peck*, 53 Me. 284; *Smith v. Moberly*, 10 B. Monr. 266; *Bank v. Goss*, 31 Vt. 315; *Black v. Lamb*, 1 Bensley, 108; *Blume v. Bowman*, 2 Ired. 341; *Butler v. Smith*, 35 Miss. 457; *Deardorff v. Foresman*, 24 Ind. 481; *Quarles v. The Governor*, 10 Humph. 122; *Ricketts v. Pendleton*, 14 Md. 320; *Pawling v. United States*, 4 Cr. 219; *Bibb v. Reid*, 3 Ala. 88; *Perry v. Patterson*, 5 Humph. 133.

The decision in all these cases is founded in part upon the idea that the obligee is guilty of fraud in receiving the bond if he has notice that the delivery is in violation of the agreement of the parties. Fraud practiced by the party seeking the remedy, upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to this title. "The covin," said Lord Coke, "doth suffocate the right." *Underwood v. McVeigh*, 23 Gratt. 409, 421; 1 Greenl. Ev., § 284.

From the very necessity of the case, parol testimony must often be resorted to for the purpose of establishing the fraud. A judgment or decree may be set aside upon parol proof of fraud in obtaining it. The title of a purchaser under the most solemn deed may be defeated by showing he is a purchaser with notice. The most impartial transactions of mankind are founded upon faith in human testimony. If all inquiry into the truth is prohibited because men sometimes commit perjury, the most flagitious conduct would find security and protection whenever the offending party has been so fortunate or unscrupulous as to procure written evidence of his claim.

The rule which prohibits the admission of parol testimony to vary a deed or other writing is not infringed by the introduction of evidence relating to the delivery of the deed. Such evidence

does not tend to contradict the deed or the recitals there merely to show there has been no valid delivery. In *Lucas*, 13 Gratt. 705, Judge ALLEN discusses with much ability the rule of the common law respecting the use of parol evidence where there is a written contract, and distinguishes between the classes on that subject. In the concurring opinion, he said: "The fraud which will let in such proof is fraud in the procurement of the instrument which goes to its validity, or some breach of confidence in using a paper delivered for one purpose and fraudulently perverting it to another."

In such cases, the oral evidence tends to prove independent facts, which, if established, avoids the effect of the written agreement. *dehors* the instrument, but do not tend to contradict it. Pages 715-716. And in *Woodward v. Foster*, 18 Gratt. 5; Judge JOYNES, in discussing the same subject, says: "It has been held that between the immediate parties evidence may be given of a contemporaneous agreement consistent with the written contract; as for example, that the bill was indorsed and delivered over for a particular purpose, as for collection, without giving the trustee the usual rights of an indorsee (*Manley v. Boy*, Eng. C. L. R. 45), or that the bill was transferred as an escrow upon an express condition which has not been complied with."

Such cases are subject to the ordinary rules applicable to the admission of parol testimony in reference to written contracts. Under these rules, it is always competent to show a want of consideration or fraud as between the immediate parties, in order to complete the contract. In support of this view, the learned judge cites a number of English decisions.

In a late case before the Supreme Court of the United States, Mr. Justice FIELD said: The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties; that cannot be qualified or controlled by its natural import, but must speak for itself. The rule does not prohibit an inquiry into the object of the parties in executing and receiving the instrument. *Brick v. Brick*, 8 Otto, 51. In the deed, it seems to be well settled that whatever relates to the time of execution, whether tending to show the time of delivery or that the delivery is in the nature of an escrow, or to disprove the deed together, may be established by parol.

This species of evidence has been considered as coming

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Before concluding the opinion, it is proper to notice and seventh pleas offered by defendants and objected plaintiffs.

The seventh plea is an affirmation or statement of the fact contained in the sixth instruction, and according to the view already expressed, prevents a substantial defense to the action.

The sixth plea, however, is not free from difficulty. It is very clear whether that plea was designed to aver actual notice to the obligee of the condition, or whether it was intended to rely on a mere presumption of notice from the fact there were no names on the paper to which no names were attached. If the latter be the proper construction, the plea was clearly erroneous, for that was already stated; if the former, the plea conforms to the sixth instruction, and is therefore a valid defense.

Perhaps, under all the circumstances, it would be safe to say that the plea was intended to aver actual notice to the obligee, and thus give the defendants the benefit of any defense arising therefrom. It is, however, not very material either way, as the case is fairly presented by the instructions, and may hereafter be disposed of in the same way.

For reasons already stated, the judgment of the Circuit Court must be reversed, and the cause remanded for a new trial in conformity with the views already expressed.

Judgment reversed.

FIRST NATIONAL BANK OF ALEXANDRIA V. TURNBULL

(32 Gratt. 695.)

Mortgage of property to be manufactured.

The proprietor of a cotton factory, by an instrument duly recorded, gave a mortgage to T. as security for advances made and to be made by T. for the purchase of materials, and for other expenses of the manufacture of cotton. T. was authorized to deliver the manufactured product to T., and not to sell the same himself without T.'s written authority, T. to receive a commission on the entire product. *Held*, valid in equity to secure T. for all such advances as against a subsequent creditor of the proprietor.*

* See *Moore v. Byrum* (10 S. C. 452), 31 Am. Rep. 58, and note, 68.

THE opinion states the case. Turnbull had judgment below.

L. Kent and S. C. Neale, for appellants.

F. Smith, Jr., for appellees.

ANDERSON, J. The plaintiff in error recovered judgment in the Circuit Court of Alexandria, against Abijah Thomas for \$4,700, with interest on \$2,200, part thereof, from the 11th of May, 1868, and on \$2,500, the residue thereof, from the 12th of May, 1868, at the rate of six per cent per annum, and \$9.62 costs; upon which an execution of *fi. fa.* was issued on the 21st of November, 1868, and levied, as appears from the sheriff's return, upon twenty-eight bales raw cotton, five bales batting, three bales cotton cloth, forty-four bolts cotton cloth, and 13,000 pounds of cotton in process of manufacture. The levy was made November 23, 1868.

The defendants in error—Turnbull & Co.—claimed the property levied on, and were allowed to interplead in said suit, and by their plea put in issue the question whether it was the property of Abijah Thomas, and subject to the plaintiff's execution, or the property of Turnbull & Co.?

To sustain the issue on their part, the latter gave in evidence an article of agreement between them and Abijah Thomas, bearing date the 12th of May, 1868, and which was admitted to record on the 26th of May of the same year, prior to the date of the said execution. The said articles, after reciting that the said Thomas had by deed, dated October 17, 1866, and duly recorded, conveyed certain property in trust to secure Turnbull & Co. the repayment of all sums of money then due to the said firm, or to become due, on account of advances already made, or to be made for the purchase of cotton for the Mount Vernon Cotton Factory, or otherwise, and also to secure the performance by the said Thomas of covenants on his part to be performed, specified in a certain agreement, referred to in said deed of trust, proceeds as follows:

"Now this agreement-witnesseth, that for and in consideration of the premises, and of the advances already made, and to be hereafter made, by the said firm of Turnbull & Co., for the purchase of cotton, or for other expenditures connected with the manufacture of cotton goods at the Mount Vernon Factory, the said Thomas

doth hereby covenant and agree to deliver the said firm of & Co. each and every yard of cotton goods manufactured at the said factory.

“And the said Turnbull & Co. on their part covenant that they will, from time to time, advance such sums of money as may be required for the purchase of cotton to be manufactured at the said factory, not exceeding ———, and that they will advance such sums as may be required to pay hands and necessary expenses incurred in running of the machinery in said factory, presentation of the pay-rolls and the bills for said expense is further agreed between the parties hereto, that the said Thomas shall sell no goods manufactured in the said factory without receipt of a written authority from Turnbull & Co. to that effect, specifying the amounts of goods to be sold, the price and terms of sale, and approving the credit of the purchaser; and Turnbull & Co. shall receive five per cent for commissions and guarantee on the entire product of said factory, whether sold by them or by their authority as aforesaid, and where sales are made by Turnbull & Co. themselves, they shall receive one per cent for commissions and charges except freight and drayage. And it is further agreed between the parties hereto, that this agreement, and all matters herein, shall have the same effect, and that Turnbull & Co. shall be entitled hereunder to the same security and advantage as if the said deed of trust, as if these presents had been executed at the time of the execution of said deed of trust.

“In witness whereof the parties hereunto set their hands and seals on the day above written.”

By the foregoing articles Turnbull & Co. seem to have assumed obligations to make additional advances to those which they had previously undertaken to make, to purchase cotton which was to be manufactured at his factory — “the Mount Vernon Factory” — and to advance further sums as may be required to pay hands and necessary expenses in running the machinery, in consideration whereof the said Thomas covenanted and agreed to manufacture the said cotton into cloth, and to deliver to Turnbull & Co. each and every yard of cotton goods manufactured by him at the factory. The goods were to be sold by said Turnbull & Co. after deducting a commission to be allowed them for guarantee and expenses, the balance of the proceeds were to be applied to repayment of the advances they made pursuant

agreement, and to their account for previous advances for which it was an additional security to the deed of trust.

It is further stipulated that said Thomas shall sell no goods manufactured in said factory unless special authority is given to him in writing by Turnbull & Co., specifying the amount of goods to be sold, the price and terms of sale, and approving the credit of the purchaser, which would be in effect a sale made by Turnbull & Co. themselves. Any sale made by Thomas, consequently, would not be made by authority of the deed, but by virtue of the special authority given in writing which Turnbull & Co. are invested with a discretion to give or not to give, and consequently there is nothing in this stipulation which is inconsistent with or repugnant to the deed. The said Turnbull & Co. are to receive five per cent commission and guaranty on the entire product of said factory, whether sold by them, or by Thomas by their authority as aforesaid, etc. The last clause seems to have been designed to show that this agreement was intended to secure the further advances then agreed to be made and as further security for what was due upon those which had been previously made and secured by the deed of trust, just as if it had been made at the same time the deed of trust was given, and had been made a part of it, and thus to exclude the idea that it was merely intended as a substitute for the deed of trust.

The execution was levied upon raw cotton and cotton in the process of manufacture, which had been purchased and delivered at the factory under the articles of agreement as aforesaid, as well as upon the cotton cloth which had been manufactured out of the raw material. Whilst Thomas, under the articles of agreement, covenants to deliver to Turnbull & Co. only the cotton cloth produced from the raw material, and does not covenant to deliver or to return to them the raw material, because it was purchased and delivered to him to be manufactured into cotton cloth for them, or to be delivered to them and sold, and the net proceeds thereof to be applied to the payment of what he owed them; yet under the covenants of this deed he had no more right or authority to divert the raw material from the uses and purposes for which it was purchased and conveyed to his factory, than he had to divert the manufactured product thereof from such purpose, and consequently he held both alike subject to the covenants of the articles of agreement, and charged with the payment of the debt he owed Turnbull & Co. He had no more right to use the raw material under the

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of Lords in 1862, 10 H. of L. Cas. 191, it was held that in equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee; which rule applies to personal property as well as to real estate. And that such a contract, if made with respect to the sale or mortgage of future-acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal.

I give the following synopsis of that case, as it strikingly resembles the case under judgment, so far as it affects the question involved: James Taylor was the owner of certain machinery in a mill which was purchased by the Holroyds. Taylor executed a deed (which was duly registered), by which it was declared that the machinery was the property of Holroyds. Taylor desired to repurchase it for £5,000, but had not the money to pay for it; whereupon it was conveyed to B. in trust, when Taylor should pay the money, to transfer it to him, and if he did not pay the money, to hold it absolutely for Holroyds. The deed contained a covenant by Taylor to insure the machinery, and another covenant that all the machinery which, during the continuance of the deed, should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. Taylor sold some of the original machinery, purchased new machinery, and sent to Holroyds accounts of these sales and purchases, but nothing was done by or on behalf of Holroyds to take possession of the newly-acquired machinery. On the 2d of April, 1860, Holroyds served Taylor with notice of a demand for payment of the £5,000. An execution against Taylor was afterward put in by a creditor. The only part of the machinery claimed by the execution creditor consisted of those things which had been purchased by Taylor since the date of the deed of trust. It was held, reversing the decree below, that though there had been no *novus actus interveniens*, the title of Holroyds was preferable to that of the execution creditor, as to the new as well as the old machinery.

Lord CHELMSFORD, who delivered a very clear and able opinion which was the prevailing opinion in the case, said, "At law prop-

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erty not existing, but to be acquired at a future time, is not assignable; in equity it is so." And again, "In equity it is not disputed. that the moment the property comes into existence, the agreement operates upon it." We think such a right may be asserted under the pleadings in this case.

That case and this are analogous in this, that both are covenants to transfer after-acquired property, and to charge it with the payment of covenantor's debt to covenantee. In the former case the covenant is contained in the deed of trust, which conveys existing property; in the latter it is contained in a subsequent deed, which is prior to the execution, and refers to the deed of trust previously given on existing property, and recognizes and confirms the same. Neither is an actual conveyance of the after-acquired property. Both are covenants by deed that it shall be charged with the payment of the debts due the covenantees; in the one case that it shall be held for that purpose; in the other that the cotton purchased by the covenantees, or purchased for them with their money, and delivered at the covenantor's factory, shall be manufactured into cotton cloth for them, every yard of which, when made into cloth, shall be delivered to them, to be sold by them, and proceeds applied to the payment of their debt. It is a trust, in the case under judgment, solemnly undertaken by Thomas, to purchase for Turnbull & Co., with their money, raw cotton, and to manufacture it into cloth—they paying the hands and the expense of running the machinery—every yard of which is to be delivered to them to be sold by them, and the proceeds, after paying their commission for selling and guaranty, etc., to be applied to the payment of their debt. No rule of law was infringed by this agreement, nor were the rights of third persons prejudiced by it. The law permits such grants to take effect upon the property, when it is brought into existence, in fulfillment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed, and the rights of third persons are not prejudiced. *Beall v. White*, 94 U. S. 382, 387, citing Story's Eq. Jur. (9th ed.), § 1040; *Dunham v. Railway Co.*, 1 Wall. 254; *United States v. New Orleans Railroad*, 12 id. 362. Equities created by such agreements are in the nature of a trust, attaching to and binding the property at the instant of its coming into existence. In this case, it creates a lien upon the property, which attaches to it prior to the lien of the execution, and which will be enforced by a court of equity. As between the

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parties, Turnbull & Co. had a lien upon the raw material and the cotton cloth, which was the product thereof, which was available against the judgment or execution creditor, with or without notice; inasmuch as according to well-established principles, a judgment-creditor must take the property subject to every liability under which the debtor held it. *Holroyd v. Marshall, supra*, 226; *Borst v. Nalle*, 28 Gratt. 423; and the numerous cases cited by BURKS, J., in support of the position.

In that case Lord CHELMSFORD, after reviewing the authorities, comes to the following conclusion: "Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established; and according to the opinion of Lord ST. LEONARDS, 'any agreement binding property for valuable consideration' will confer a similar right."

In this case the articles of agreement were duly admitted to record, which was constructive notice to creditors and purchasers, unless contracts in respect to after-acquired property are not embraced in the recording acts. The language of our recording act is very broad and comprehensive. Code of 1873, ch. 114, § 4. It is: "Any contract in writing, made in respect to real estate or goods and chattels, * * * shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract." There are no words, either expressly or by implication, excluding contracts in respect to after-acquired property. And as to notice, the register would furnish the same information of the dealing with future as with existing property. Without now construing the statute with regard to all contracts in respect to after-acquired property, we are of opinion the articles of agreement in this case was such an instrument as the statute authorizes to be recorded, and that it was duly recorded, which must be regarded as constructive notice to creditors and subsequent purchasers.

In the light of what has been said, we think there was no error in the refusal of the court to give the first instruction asked for by the defendants — the plaintiffs in error. Though it may enunciate abstract principles of law correctly, in the view which we have taken of the case they were wholly irrelevant and inapplicable to

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the case. And as to the instruction given by the court in its stead, it was not strictly applicable to the case as we have viewed it, but could not have prejudiced the defendant. No exception was taken to the second, third and fourth instructions given by the court, which are the same that were asked to be given by the defendant.

We are further of opinion that the verdict of the jury was right, and that the court did not err in overruling the defendant's motion for a new trial. The court is of opinion, therefore, to affirm the judgment of the Circuit Court with costs.

Judgment affirmed.

HEY V. COMMONWEALTH.

(22 Gratt. 946.)

Criminal law — witness — not leaving court-room on order of court.

On a trial for receiving stolen goods, on motion of the attorney for the Commonwealth, without objection by the prisoner's counsel, the court directed the witnesses to leave the court-room; and they all left but one, who was in the prisoner's box, held on a requisition for larceny of the same goods. The attorney for the Commonwealth offered that man as a witness. *Held*, not disqualified by reason of his remaining in the court-room, after the order of the court.

CONVICTION of receiving stolen goods. The opinion states the point.

Samuel M. and Charles L. Page, for prisoner.

The Attorney-General, for Commonwealth.

BURKS, J. When Henry W. Hey (the plaintiff in error here) was on trial in the court below, before any evidence had been introduced, the attorney for the Commonwealth asked that all of the witnesses should be sent from the court-room, and no objection being made by the prisoner, this was ordered by the court, and all of the witnesses then sworn for the Commonwealth, and the witnesses for the prisoner, were sent out, except Police Justice WHITE,

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who, by consent of counsel on both sides, was allowed to remain. Afterward, when evidence had been introduced tending to show that the prisoner obtained the goods mentioned in the indictment from one Augustus Byers, who had been arrested, as stated in the bill of exceptions, for the larceny of said goods, and was then in the prisoner's box in the court-room, held on a requisition from the governor of North Carolina, the attorney for the Commonwealth called said Byers, and asked that he be sworn as a witness for the Commonwealth, but the counsel for the prisoner objected, on the ground (and for no other cause) that Byers had remained in the court-room, and had not been sent out with the other witnesses. The objection was overruled and the prisoner by counsel excepted. This action of the court is assigned as error.

In the trial of causes, both civil and criminal, it is a rule of practice devised for the discovery of truth and the detection and exposure of falsehood, and well adapted to the ends designed, for the presiding judge, on the motion of either party, to direct that the witnesses shall be examined out of the hearing of each other. Such an order upon the motion or suggestion of either party, it is said, is rarely withheld ; but that by the weight of authority, the party does not seem entitled to it as a matter of right. 1 Greenl. Ev., § 432. To effect this object, generally, the respective parties are required to disclose the names of the witnesses intended to be examined, and then the witnesses are simply ordered to withdraw from the court-room and warned not to return until called, or as is sometimes the case, they are placed under the charge of an officer of the court, to be by him kept out of hearing in the jury room or some other convenient place, and brought into court when and as they may be severally needed for examination. If a witness or the officer in charge willfully disobeys or violates such order, he is liable to be punished for his contempt, and at one time, according to the English practice, it was considered that the judge, in the exercise of his discretion, might even exclude the testimony of such a witness. But now it seems to be the practice to allow the witness to be examined, subject to observation as to his conduct in disobeying the order. 2 Taylor on Ev. (7th ed.), §§ 1400, 1401, 1402 ; 3 Whart. Crim. Law (7th ed.), § 3009 *a*, note, and cases cited by these authors.

In *Cobbett v. Hudson*, 72 Eng. C. L. 11 (decided by Queen's Bench in 1852), Lord CAMPBELL, C. J., observed, that with respect to

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ordering witnesses out of court, although this is clearly within the power of the judge, and he may fine a witness for disobeying this order, the better opinion seems to have been that this power is limited to the infliction of the fine, and he cannot lawfully refuse to permit the examination of the witness. Citing *Cook v. Nethercote*, 6 C. & P. 741 (25 Eng. C. L.); *Rex v. Colley*, 1 Moody & Mal. 329 (22 Eng. C. L.); *Thomas v. David*, 7 C. & P. 350 (32 Eng. C. L.) And in *Chandler v. Horne*, 2 Moody & Rob. N. P. Cas. 423, **ERSKINE, J.**, said: "It used to be formerly supposed that it was in the discretion of the judge whether the witness should be examined. It is now settled and acted upon by all the judges that the judge has no right to exclude the witness; he may commit him for contempt, but he must be examined; and it is then matter of remark as to the value of his testimony, that he has willfully disobeyed the order. See also *Nelson v. State*, 2 Swan, 237.

The rule as stated seems to have been applied to cases in which the witness had willfully disobeyed the order of the court. Cases may arise in which a party to the suit has been guilty of such gross misconduct as to amount to a fraud upon the court and the adverse party. Suppose a case in which the court has directed an examination of the witnesses out of the hearing of each other, and has required the parties respectively to produce their witnesses before the court, in order that they may be warned by the judge and ordered to withdraw, and one of the parties willfully and fraudulently withholds the name of a witness, and purposely suffers him to remain and hear the examination of the witnesses on the other side, would he be permitted, under such circumstances, to examine that witness? The question need not be answered, as the case here is not the case supposed. In the present case, the motion for the separation of the witnesses was made by the worthy attorney for the Commonwealth. The witnesses on both sides were sworn and sent out of the court-room. The witness, Augustus Byers, was present, but he was not then sworn and sent out, as were the other witnesses. He was in legal custody, and of course could not absent himself. But he might have been sent out in charge of an officer. This should have been done, if it was intended to examine him, for of all the witnesses, it was most important to the prisoner that this witness, then in custody under a charge of larceny of the goods in question, should not have been permitted to hear the statements of the other witnesses, who were examined before he testified. His

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name appears at the foot of the indictment as one of the witnesses sworn and sent by the court to the grand jury to give evidence. It may be that the attorney for the Commonwealth was not aware of the presence of Byers in the court-room while the other witnesses were under examination, or perhaps at the time he made the motion to send the witnesses out it was then his purpose not to examine him as a witness, and he may have considered it necessary to examine him after hearing the testimony of the other witnesses. Under the circumstances, we do not think the court erred in refusing to exclude this witness, his presence during the previous examination of the other witnesses being open to observation, and a matter to be weighed in determining the value of his testimony.

[Omitting minor questions.]

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON TERRITORY.

OREGON STEAM NAVIGATION COMPANY V. HALE.

(1 Wash. 283.)

Contract — void as against public policy.

A covenant made by a corporation of one State with a citizen of another, not to run a steamboat or allow its machinery to be used on any other boat in any of the waters of certain States, is void as against public policy.

THE opinion states the point.

J. E. Wyche and Frank Clark, for plaintiff in error.

B. F. Dennison, O. B. McFadden and C. C. Hewitt, for defendant in error.

JACOBS, C. J. The question presented for decision in this action is whether a covenant made between citizens of this Territory and a corporation in the State of Oregon, not to run a steamboat, nor

to suffer it to be run, nor to allow its machinery to run any other boat, in any of the waters of the State of Oregon or of the State of California, and many of the navigable streams of this Territory, is valid, or is to be regarded as void, on the ground that it is opposed to the policy of the law.

Contracts in restraint of trade are of two kinds: 1. Those in general or total restraint of trade. 2. Those in partial or limited restraint of trade. Those of the first class are void upon their face, and have been uniformly so held to be by English and American courts. For near two centuries all contracts in restraint of trade were included in this class and were therefore declared void. But as commerce and general business increased, and artisans of all kinds multiplied, this rule was felt to be unnecessarily rigorous. The first limitation of its general operation was made by the establishment of the distinction between contracts under seal and parol contracts. The courts for a time enforced the former but refused to enforce the latter. In other words, the rule was virtually changed into a law of evidence. But this distinction, having no sure foundation in reason or policy, was soon overthrown. Then came the present distinction between contracts in total restraint of trade and those only in partial restraint, which is now firmly settled both by the adjudications in England and in this country. The first, as we have seen, were uniformly held void. The reasons are well stated by MORTON, J., in the leading case in America, that of *Alger v. Thatcher*, 19 Pick. 54. Among the reasons given by the learned judge is the following:

“5. They expose the public to all the evils of monopoly. And this is especially applicable to wealthy companies and large corporations who have means, unless restrained by law, to exclude rivalry, monopolize business and engross the markets. Against evils like these wise laws protect individuals and the public by declaring all such contracts void.” In *Taylor v. Blanchard*, 13 Allen, 372, the court say: “The law always regarded monopolies as hostile to the rights and interests of the public. One method of obtaining them in early times was by the grant from the sovereign to a particular individual of the sole right to exercise a particular trade. The mischief arising from these monopolies became so intolerable that the practice was suppressed by a clause in Magna Charta. This clause, however, does not apply to grants for the sole use of a new

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invention for a limited period. Copyright and patent-right laws rest on this ground."

Another method by which monopolies were sought to be obtained was by private contracts, by which one of the parties bound himself not to engage in, nor carry on some particular trade or business, without any limitation of time or place. The restraint was usually sought to be effected by means of a bond with a heavy sum fixed by the obligor as liquidated damages. Thus persons and corporations attempted to hedge themselves around -- to deprive the public of the benefits of competition and to secure a continuance of their monopoly.

The facts in this case show : First, that the California company attempted upon the sale of this steamer to secure their monopoly of the navigable waters of California by the imposition of a heavy bond. Second, The Oregon company attempts a security of their monopoly of the navigable waters of the Columbia river and its tributaries by the requisition of a like bond. Thus by two bonds, if valid, this fine steamer was excluded from the navigable waters of two great States. It would have required but one more bond, and that covering but a comparatively small area of territory, to have effectually excluded her from the then American waters on the Pacific coast. It is not difficult to see the disastrous consequences to which such a policy, if sanctioned by the courts, would lead.

In *Michell v. Reynolds*, 1 P. Wms. 181, which is usually cited as a leading case upon this subject, it was held that a contract not to use a particular trade within the kingdom was void, on the ground, that "it can never be useful to any man to restrain another from trading in all places, though it may to restrain him from trading in some places, unless he intends a monopoly, which is a crime."

The question as to what was a reasonable extent of territory, in contracts in partial restraint of trade, has been much discussed by different courts and judges. The earlier cases fix indefinitely the boundaries over which valid contracts in partial restraint of trade can extend, by negative declarations. In some cases it is said, that a radius of twenty, or fifty, or even one hundred miles is not too great. The only rule furnished for our guide in this respect is to consider the character and nature of the trade attempted to be restrained. In England, the rule is firmly established, that if the restraint extends all over the kingdom, it is unreasonable on its

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face and therefore void. In New York, the rule is settled, that if the prohibition extends over all the State it is unreasonable and therefore void. *Dunlop v. Gregory*, 6 Seld. 244.

The Supreme Court of that State have gone further and held, that a restraint extending to all the territory west of Albany is void. *Lawrence v. Kidder*, 10 Barb. 641. The general rule is adopted in Massachusetts. 13 Allen, 272. There are dicta to the same effect in Ohio and other States. *Lange v. Werk*, 2 Ohio St. 528-9. In California, the rule is the same as in New York and Massachusetts. *Wright v. Ryder*, 36 Cal. 342.

The above cited California case is peculiarly interesting, and directly in point. The facts of that case were, that the California Steam Navigation Company sold this same boat to the Oregon Steam Navigation Company for the sum of \$75,000, and the covenant that she should not be run, nor should her machinery be used to run any other boat for ten years thereafter, in any of the navigable waters of California, including her rivers and her bays as well as ocean shore line. To secure the observance of the covenant made by the Oregon Steam Navigation Company, a bond was exacted, with the sum of \$75,000 fixed as liquidated damages. The date of all was May, A. D. 1864. The boat was taken back to California within the prohibited time and run between San Francisco and Vallejo. A suit was brought, in which the validity of the bond and covenant was directly involved. The judgment of the Supreme Court of California was that the restraint was unreasonable and that the bond was therefore void. The Oregon Steam Navigation Company intervened in that suit, and by able counsel urged the court to support the bond which they had made.

This action is founded on a similar bond given by the vendees of the Oregon Steam Navigation Company to plaintiff, or to themselves as vendors. The restraint attempted to be secured by the bond in this action is far more extensive than that of the California bond. The prohibition here is not only the navigable waters of California as before enumerated, but there is added to that the Columbia river and all its tributaries. In fact it sweeps over the Pacific coast, with the exception of the Straits of Fuca and Puget sound. If the restraint imposed by the California covenant was unreasonable and therefore void, how much more so is this?

Again, the cases all agree that the covenantee must have some interest to be protected by the extension of the covenant. What

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interest, it may be asked, had the Oregon Steam Navigation Company in extending the restraint of their covenants over the waters of California, where the breach is alleged to have taken place? The probable, in fact the only, answer is, that they and their assigns were bound by the covenant given by them to the California company. Suppose such to be the case. All the authorities agree that in no case can a greater restraint be imposed than the interest to be protected requires. The only interest this Oregon company had to be protected in the waters of California was that imposed by the condition of the bond executed by them to the California company. That bond expired by its own limitation in May, A. D. 1874. But the bond taken by the Oregon company from the defendants extended till A. D. 1877. The prohibition was greater than their interest required. Thence we are of the opinion that on this ground the covenant is unreasonable on its face and therefore void. *Horner v. Graves*, 7 Bing. 743; *Chappel v. Brockway*, 21 Wend. 158.

It is very doubtful whether a person or corporation can acquire an interest in this manner, which can become the consideration of a contract for even a partial restraint of trade. If an interest can thus be acquired, and that interest be protected by a pecuniary covenant, it would be an easy matter for a wealthy corporation, or a combination of wealthy corporations, to extend their interests over the whole of the United States. Certainly no case in point sanctioning this doctrine has been presented, and it is very doubtful whether any can be found. But it not being necessary to decide this point, we intend to express no positive opinion upon it.

Although we hold that the weight of authority settles the rule to be that a person or corporation cannot hedge up a monopoly by contracts of this kind, and that a restraint extending over an entire State is invalid, yet there are some seeming exceptions to the latter part of the above proposition that require to be stated.

Particular routes of travel, whether by land or on a particular stream, though extending from one State to another, are excepted. *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Palmer v. Stebbins*, 3 Pick. 188; 15 Am. Dec. 204; *Pierce v. Woodward*, 6 Pick. 206; *Gilman v. Dwight*, 13 Gray, 356; *Taylor v. Blanchard*, 13 Allen, 374.

It has also been held that one may lawfully sell a right to carry on a secret trade, and bind himself not to carry it on nor divulge

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its secret, and the covenant may be general. *Vickery v. Welch*, 19 Pick. 523; 13 Allen, 374.

So also of the use of a machine protected by a patent. *Stearns v. Barrett*, 1 Pick. 443; 11 Am. Dec. 223; 13 Allen, 374.

We find no error in the record, and the judgment of the court below will be affirmed.

Judgment affirmed.

GOODMAN V. CODY.

(1 Wash. 320.)

Verdict — arrived at by chance.

A verdict of damages, ascertained by averaging the aggregate separate markings of all the jurors, in accordance with a precedent agreement, to abide the result, is arrived at "by chance," and will be set aside. (*See note, p. 815.*)

THE opinion states the point.

J. E. Wyche and James M. Lasater, for plaintiff in error.

Elisha P. Ferry, for defendant in error.

GREENE, J. The main question in this case is a decisive one. It is, whether the verdict of the jury in the court below is a verdict arrived at by a resort to the determination of chance or lot, contrary to the statute. The statute, to which it is supposed to be contrary, provides that a verdict may be vacated and a new trial granted for "misconduct of the jury," and that "whenever one or more of the jurors shall have been induced to assent to any general or special verdict, to a finding on a question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors."

In the case at bar the jury found, or pretended to find, a verdict for defendant in error (plaintiff below) of \$675. By the affidavits of jurors, and by no other sufficient evidence, it appears that some of the jury was induced to assent to a verdict other and different

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from their own conclusions, and arrived at by a resort to the following mode of determination: By agreement among the jurors, they were severally to mark on paper such amounts as they respectively saw fit, and the quotient of the sum of these amounts, divided by the number of jurors, was to be their verdict. Such an operation they went through twice. The first quotient was so repugnant to the convictions of some, because too large, that they refused to be bound by it. The second quotient, although much larger, was returned by the jury into court, and is the verdict before us.

It is well-settled law, that a verdict determined in this manner is a bad verdict. If the jury conclude its deliberations by such an operation, if the last step in getting at a verdict be the terminal step in such an operation, both in reason and authority the verdict is bad. *Dana v. Tucker*, 4 Johns. 487; *Roberts v. Failis*, 1 Cow. 238; *Wilson v. Berryman*, 5 Cal. 45.

But if the operation be merely mediate and not determinate, if it be resorted to merely to acquaint individual jurors with the average sense of the jury on the question of damages, which damages are subsequently to be determined by agreement, then there is neither reason nor authority for holding the verdict avoided by the operation. 5 Cal. 45; 1 Graham and Waterman on New Trials, 102, 108, and cases cited; 2 id. 378, 380, and cases cited.

The number of times the operation is indulged in is immaterial, except perhaps as an index to the purpose which has induced it. How many times soever it be performed, if the last time it be not determinate, the verdict is not bad by reason of it; but if the last time it be determinate, it is thoroughly bad.

In this case, a second operation seems to have determined the verdict. It resulted in a sum which was returned into the court below, and there received, as the true finding of the jurors, one and all; while from the affidavits it sufficiently appears that it was so returned not because a true joint and several finding, but because it was the result of the second operation of making, addition and division.

Affidavits of jurors cannot be received under our law to impugn the verdict, unless that verdict be arrived at by a resort to the determination of chance or lot; and to exclude such affidavits in this case, the defendant in error very forcibly argues, and his argument is supported by a very able opinion of the judge of the court below, and by eminent foreign authority (*Turner v. Two-*

lumne Co., 25 Cal. 400; *Boyce v. Stage Co.*, id. 460; *People v. Hughes*, 29 id. 257; *Thompson v. Comm.*, 8 Gratt. 637; *Smith v. Cheetham*, 3 Cai. 61), on which that opinion is based, that a determination by an operation of the kind specified is not a determination by chance or lot. The majority of this court, however, have arrived at a different opinion. We hold it a determination by chance.

The statute, allowing proof by affidavits of jurors, is truly in derogation of the common law, but it is at the same time a remedial statute. It is designed to relieve suitors from a very sore evil of illegal verdicts, the illegality of which can seldom be proved unless by affidavits of the very men who have conspired to render them. The statute is to be liberally construed to effect the intent of legislation. The degree of liberality of construction is to be measured by the reason for it. According to the bulk and ramifications of the mischief to be cured, the words of the statute are to be expanded until, if necessary, their utmost stretch and distribution of meaning and application is reached.

It seems too plain for argument, that a verdict got in the manner indicated has faults, the same in kind as those which attend and vitiate an unquestionably chance verdict, *e. g.*, a verdict got by the throw of dice. In the instance of the dice-throw, the verdict is bad because it is not the result of the law and the intelligence and judgment of each juror applied to the evidence in the case, because it is the result of a blind venture by each juror of rights of a controversy intrusted for decision to himself, to determination by a mode the issue of which his intelligence does not foresee, nor his judgment have to approve. The same defects exactly occur in a verdict got by average of sums furnished by individual jurors. In neither case is the verdict made valid by the oath of the jury, since in both cases it is got in a manner incompatible with submission to their oath.

But the verdict by arithmetic average not only has the identical faults of one by dice-throw, but it has superadded viciousness of its own, which would lead us to presume that the legislature, when they saw the necessity of lifting the shield that protected the one kind, could not have failed to see, could not have left still covered, the more egregious iniquity of the other. We ought to look for and expect to find in the law exposing for redress the method fraught with lesser evil, words efficient to expose for the same purpose the kindred method fraught with greater.

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When a jury agrees to get a verdict by average, the low-figure jurors, no matter how largely in majority, are at the mercy of the high-figure jurors. A single juror, perhaps the individual lowest in intelligence, of poorest judgment, the one least capable of influencing his fellows, and quite possibly also the very juror disposed to be most compliant, may, by setting down an exorbitant number, draw all the rest up toward a sum he himself would like to have given. The agreement is a fraud by all the jurors on the parties. But not only so, it is liable to unwatched and incorrigible abuse. It opens a field for further fraud, on jurors by jurors, fraud within fraud. Nor is this all. The juror entering into the agreement finds himself instantly torn by distracting motives to action, his undertaking with his co-jurors impels him in one direction, the obligation of his oath drags him in another; his undertaking requires him to set down as his number the damages he really thinks the plaintiff ought to recover, the obligation of his oath (if he has not lost all sense of it) demands that he set down that number which in his judgment will conduce most effectually to an average that his conscience can approve; and obviously, unless the average sense of the jury and his own independent conclusion, in his judgment, coincide, the numbers in the one instance and in the other will differ.

A verdict determined by average is not a legal and true verdict; it has no true ring; it has not the stamp of the jury's oath upon it; it is a composite fraud washed with a golden name. Yet, strange to say, counsel are found to argue, and authorities to support this method of average, and they defend it as being analogous to the action of a master in chancery in averaging testimony on values. Now, a master in chancery, so far forth as he is a judge of fact, may be said to correspond in function with a jury, and it may be plausibly argued, that as he averages estimates of different witnesses, so may a jury. But here expire the duty of the judge of fact, and the analogy, together. The judge of fact, in averaging testimony, does so conformably to reason and good conscience. The jurors, in averaging a verdict, average whatever sums are set down, however unconscionable. The judge of fact averages the estimates of witnesses, but jurors are not witnesses; and it is just as practically wrong for jurors to average their numerous fixed, and even conscientious, estimates, as it is practically impossible for a master to average his unit of an estimate. The duty of a jury is not unqualifiedly to

agree, but to agree if they can without violating their consciences. If they cannot agree without a violation of conscience by one or more of them, then they can render no joint verdict good in law. The parties are entitled to a verdict, to which the consciences of all the jurors have been brought to yield assent, and they have a right that nothing else styled verdict shall be foisted upon them. Parties have a right, that the intelligence, capacity and judgment of each juror shall avail in the production of the verdict, not as one unit against eleven other equivalent units, but for what they are worth as compared with the total intelligence, capacity and judgment on the jury. It is wrong for a juror, going to the jury-room, to take it for granted that he is an average of the jurors, that all are his equals in discernment, memory, comprehension and strength of conviction, and that consequently an average of his and their opinions will be a fair and just verdict; it is his duty to draw all opinions to his own, if by just reasoning upon the evidence, and becoming assertions of his own convictions, he can, and when he cannot draw them further, it is his duty to yield to the views of his fellows, as far as necessity may require and conscience permit, and thus, by alternate insistence and deference, do his best to bring about an agreement; and if he cannot conscientiously reach an agreement with his fellows, it is his duty, a duty owed by him to the parties, and sanctioned by his oath, to hang the jury.

The foregoing considerations show that a verdict found in the manner pursued to arrive at the one at bar has the same defects as a verdict confessedly determined by chance; that the finding got by average is bad, and subject to even more objections than one determined by throw of dice; that the statute to relieve against verdicts determined by chance is remedial, and ought to be liberally construed to relieve against all verdicts that can properly be said to be found and vitiated by a resort to such a determination; and that if it be possible without violence to language to consider a finding got by average, as in the case before us, to have been arrived at by a resort to the determination of chance, then it is the duty of this court, in this case, so to apply the statute as to protect the plaintiff in error against the verdict returned by the jury in the court below. It remains to show, that the finding a verdict by average may, within the true and received meaning of words, be said to be determined by chance.

What is chance? It is said by a learned judge, in a case cited

(*Turner v. Tuolumne County Water Co.*, 25 Cal. 402), that a verdict found by average cannot be called chance, because derived from sums the result of intelligent action of individual jurors, by means of "the most accurate of the sciences." But for all that exact science had to do with the matter, he who gave that opinion might as well have held that were twelve dice cast, and the sums turned up added together, the aggregate divided by twelve, and the quotient taken for a verdict, such a verdict would not be got by determination of chance, because got by "the most accurate of sciences." The learned judge erred doubly: First, he overlooked the fact that the verdict is already determinate and fixed, as soon as the twelve sums are ascertained, and before the exact science is applied, within the maxim, *Id certum est quod certum fiat*; and second, he evidently mistook the nature of chance, falsely fancying that what is certain in result or is brought about by known or intelligent agencies, cannot be said to result from chance.

Among all the cases that have been cited in favor and against the verdict in the case at bar, being considered one got by chance determination, we find none in which the meaning of the word "chance" is discussed, and all the cases are in this respect unsatisfactory.

The word "chance" has not been adopted or defined as a law term, is not technical, and must be deemed used by the legislature in a popular sense. According to generally accepted and ordinary use of the word, any thing is said to have happened by chance to any one, which was neither understandingly brought about by his act, nor pre-estimated by his understanding. If one move his arm inconsiderately, and by the movement unintentionally break a crystal vase, we say he did it by chance; for his intelligence did not from step to step estimate, or direct, the action to its result. Yet, although the result was a chance one, it was the certain, inevitable result of assured relative positions of the arm and the vase, and the muscular action, perhaps voluntary, of the former. Again, when a die is thrown, the position in which the die will fall is a necessary effect from well-known but unestimated causes; by the original position of the die, its size, form and weight, the manipulation given it, the distance and velocity of the throw, the sort of surface it falls upon, and perhaps other things, the final position of the die is determined with mathematical certainty, and may, by any painstaking mathematician possessed of the elements

of the problem, by the use of "the most accurate of the sciences," be calculated with infallible precision. Still we say, and properly say, that the final position of the die is determined by chance; and by this we mean, not that the result of the throw was uncertain, or a consequence of unknown causes, but that it was produced by causes, the efficient and proportionate operation of which was, in fact, by the person to whom it chanced neither estimated nor intelligently controlled for the accomplishment of the result. With the same propriety, we speak of meeting by chance a person at a certain place at a certain time; and this, no matter how exactly we may have precalculated and intended being ourselves at that place at the particular time, nor how exactly that person may have precalculated and intended being himself at the same place at the same time likewise, provided we, to whom the chance happens, did not precalculate nor consciously bring about the meeting then and there.

From the popular use of the word "chance," as illustrated in these examples, it seems plain to us that a juror resorts to the determination of chance for a verdict whenever he resorts to any method of determination, the steps and results of which are beyond his calculation, and unfollowed and unparticipated in by his understanding, and all the jurors resort to such a method, when they resort to the method of average. With a verdict got, fairly as between the jurors, by such a method, the conclusion attained by the intelligence of any one juror never coincides, unless the average of the conclusions of all the jurors happens to be identical with his own; whereas, in a good verdict, every element of chance is eliminated by the fact, that before the verdict is complete, every intelligence on the jury, being first well apprised of the action of every other, has, by its own individual, conscious action, ratified and arrived at the same conclusion with every other. In a verdict got by the method of average, every sum that goes to develop the verdict is a chance sum as to each juror, save the sum that the juror himself sets down; and the verdict is not redeemed from being a chance verdict as to each juror, and therefore chance as to all, by the fact that each has contributed to it an element not of chance, any more than a dice-throw would be redeemed from being chance, by the fact that the throw was in part controlled by certain intentional motion of the dice box.

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The verdict in the court below must be set aside, because arrived at by a resort to the determination of chance.

We notice nothing else erroneous in the record, unless it be that the charge of the judge should have distinguished between the degree of negligence which would render a surgeon liable when operating gratuitously and that which would render him liable when operating for reward. But as to whether such distinction was necessary in the case we express no opinion.

Let the judgment of the court below be reversed, and a new trial be had.

Judgment reversed.

NOTE BY THE REPORTER.—In *Allard v. Smith*, 2 Metc. (Ky.), 297, a charge that the jury might ascertain the amount of damages in the way resorted to in the principal case was held error. The doctrine of the principal case was also held in *People v. Barker*, 2 Wheel. Cr. Cas. 19, and in *Harvey v. Rickett*, 15 Johns. 88, is said to be "very well settled."

But in *Cochlin v. People*, 93 Ill. 410, it was held that where, in a criminal case, all the jurors concur in opinion as to the guilt of the accused, which is apparent, but differ as to the length of time he should be sentenced, and agree that each will state the time he thinks proper, and that the aggregate of these sums, divided by twelve, shall be the verdict, after which some dissent, and the odd months are struck off, and all then agree as to the time thus fixed, understandingly, the verdict will stand. This is founded on *Thompson's case*, 8 Gratt. 638, which was exactly such a case.

In *Smith v. Cheetam*, 3 Cal. 61, SPENCER, J., said: "The amount of damages was ascertained by each person's setting down the sum he thought fit, and dividing the aggregate by twelve. If this practice be tolerated, it will prevent that discussion and examination so necessary to the development of truth and so essential to justice. To affirm the present verdict would be to sanction a practice dangerous in the highest degree."

LIVINGSTON, J., said: "Here the method of deciding as effectually precluded a proper exercise of judgment as that of chance; and what is worse, put it in the power of any one juror, from prejudice, passion, or other bad motive, to ruin a defendant. He is only to set down a sum sufficiently large, and if his fellows adhere to their promise, a most outrageous verdict will be the consequence. Thus no one can tell, at the time of pledging himself, what sum he will finally agree to." But KENT, C. J., said: "This has no analogy to the case of casting lots, or determining by chance, for whom they shall find. The liquidation of damages must always, in a certain degree, be the result of mutual concession, since the amount of the injury is not capable of being ascertained with mathematical precision. If this mode of collecting the medium of their different opinions was fraudulently abused by any of the jury, by fixing on a sum intended to be extravagantly high or low, and which was not given in good faith, it would perhaps justify our interference." "I do not think that this mode of ascertaining the average sum was in itself exceptionable."

So in *Cowperthwaite v. Jones*, 2 Dall. 55, it was said, this mode is not "at all similar to the case of casting lots for their verdict. In torts and other cases where there is no ascertained demand, it can seldom happen that jurymen will at once agree upon a precise sum to be given in damages; there will necessarily arise a variety of opinions, and mutual concessions must be expected; a middle sum may in many cases be a good rule: and though it is possible this mode may sometimes be abused by a designing jurymen, fixing upon an extravagantly high or low sum, yet unless such abuse appears, the fraudulent desire will not be presumed."

In *Thompson's case*, 8 Gratt. 637, this mode of ascertaining the length of a term of imprisonment was approved, where there was no precedent agreement to abide the result. This is also the doctrine of *Dana v. Tucker*, 4 Johns. 488, where it is said, *obiter*, that such a precedent agreement would vitiate a verdict so found. To the latter effect is *Harvey v.*

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Bickett, 15 Johns. 87; *Roberts v. Failis*, 1 Cow. 323; *Grinnell v. Phillips*, 1 Mass. 541; *Warner v. Robinson*, 1 Root, 194; *Wilson v. Berryman*, 5 Cal. 44. In the latter case the court said: "Such verdicts are regarded in the same light by the courts as gambling verdicts, and will be invariably set aside, just as if the jury had thrown dice, or resorted to any species of gambling to ascertain the amount." In *Turner v. Tuolumne Water Co.*, 25 Cal. 397, such a verdict was held not to be a "chance verdict," within the statute, but it was said, obiter, to be vicious, within the authorities above cited. The verdict, however, was not set aside.

The doctrine of the principal case was held in *Werner v. Edmiston*, 24 Kans. 159.

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(1 Wash. 422.)

Negotiable instruments — parol evidence to show character of signing.

Parol evidence is competent to show that a joint maker of a promissory note, apparently signing as principal, was really a surety, and that this was known to the holders.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

C. D. Emory, for plaintiff in error.

McNaught & Leary and *H. G. Struve*, for defendant in error.

LEWIS, J. This was a suit brought in the District Court of the Third Judicial District, on a promissory note, in the words and figures following, to wit:

"\$800 currency.

SEATTLE, December 3, 1872.

Three months after date, without grace, we promise to pay to the order of John E. Hale, at the Puget Sound Banking Company, Seattle, W. T., eight hundred dollars, U. S. currency, with interest thereon in like currency at the rate of two per cent per month from date until paid, said interest payable quarterly, and if not paid to be added to the principal and bear the same rate of interest as the principal until paid.

Value received.

JOHNSTONE BROS.,
L. C. HARMON."

* To same effect, *Irving v. Adams* (48 Wis. 406), 33 Am. Rep. 517.

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The action was brought by the payee John E. Hale, for a balance due upon the note, against the makers, Johnstone Bros., and L. C. Harmon, plaintiff in error.

Harmon filed his separate answer, setting up as a defense, that the note was made, executed and delivered to defendant in error, in consideration of a loan made at the date thereof to Johnstone Bros., and that Harmon signed the same as surety only, which facts were at the time of the execution of the note, and now are well known to said Hale. That shortly after the maturity of the note, in March, 1873, he called upon Hale and informed him that he wished to be released from all liability upon the note, and requested him to proceed to collect the same; and he made a like request at two other times prior to April 15, 1873. That from the maturity of the note until July, 1873, Johnstone Bros. were carrying on business in Seattle as merchants, and at no time had in store less than \$5,000 worth of goods, subject to attachment and levy for payment of their debts. That about the middle of July, Johnstone Bros. closed their store at Seattle and publicly removed their stock of goods to Tacoma, and continued business at the latter place until November, 1873, when they became insolvent. That during the time they were in business at Tacoma, they were possessed of goods of the value of \$5,000, out of which the said note was collectible. That about the 15th of April, 1873, the said Hale, in answer to the demand of said Harmon to put the note in process of collection, he (Hale) stated to Harmon that the said note was paid, and that he need not give himself any further trouble about it. That by reason of said statements of Hale, the plaintiff in error at all times supposed the note to be paid in full, and never knew or heard to the contrary, until the 25th of December, 1873. That said Johnstone Bros. have continued insolvent since November, 1873.

The defendant in error interposed his demurrer to this defense, the court below sustained the demurrer and the ruling of the District Court on the demurrer is here assigned for error.

This case presents for our determination two questions:

1. Whether it is competent when two or more persons have signed a promissory note jointly, for one to show by parol evidence that he was surety for the other.

2. Whether the facts set up in the answer, as above stated, are sufficient to discharge Harmon, admitting that he signed the note as surety.

These are questions of much importance, especially the first one, and we have given them much consideration.

As to the first point it seems to be definitely settled that such evidence is admissible in equity, when this relation was known to the holder at the time of entering into the contract. Parson's Notes and Bills, 233. Whatever will discharge a surety in equity, will discharge him at law, is also a well-settled principle. 2 Am. L. Cas. (3d ed.) 293; 3 Comst. 452.

It is insisted by counsel in opposition to the introduction of such evidence at law :

1. That he is estopped by his own admissions in the note.
2. That such evidence contradicts and varies his written contract.

These questions have not heretofore been adjudicated by this court, and there is some conflict in the authorities as to the points.

It is claimed by counsel for defendant in error, that this question has been decided by the Supreme Court of the United States, in the case of *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 257. But an examination of that case will show that it was disposed of on a different point. The action was brought on a bond under seal, wherein the parties in express terms declared that they were bound as principals. THOMPSON, J., in delivering the opinion of the court says: "An estoppel has sometimes been quaintly defined the stopping of a man's mouth from speaking the truth, and would seem in some measure to partake of severity if not injustice. But it is in reality founded upon the soundest principles as a rule of evidence. It is a salutary and practical rule that a man shall not be permitted to deny what he has once solemnly acknowledged. In ordinary cases, where sureties sign an instrument without any designation of the character in which they become bound, it may be reasonable to conclude that they understood that their liability was conditional and attached only in default of payment by the principal. Hence the reasonableness of the rule of law, which requires of the creditor that his conduct with respect to his debtor should be such as not to enlarge the liability of the surety, and make him responsible beyond what he understood he had bound himself. But when one, who is in reality only a surety, is willing to place himself in the situation of a principal by expressly declaring, upon his contract, that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself."

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In this case, after an elaborate discussion of the question, the court says: "The fact of defendant's being a surety is not only not admitted, but it is alleged that he is estopped from setting it up by his own admission in his obligation that he is principal, and we are aware of no case giving countenance to such a defense, under such circumstances."

The Supreme Court understood that case to turn upon the question of estoppel. The same case was again before them in a proceeding in equity. And in announcing the decision, the court says: "That the decision turned upon the point that the defendant and all the other obligors had by express terms of the obligation bound themselves as principals, and were thereby estopped from setting themselves up as sureties, and in that case it was held such evidence was not admissible even in equity. *Sprigg v. Bank of Mt. Pleasant* 14 Pet. 201.

But the precise point in the case at bar has at no time been passed upon by the Supreme Court of the United States.

A case precisely in point was before the Supreme Court of Ohio. "Whether the obligor is estopped by his bond from showing his relation as surety except when the instrument affords evidence of the fact?" And the court hold: "That there is no attempt to deny or to evade the obligation of the bond. If the obligation recited that the obligors were principals there might be color for the assumption that the admission concludes them. In the absence of such recital we find nothing to stop them from proving the truth." *Bank of Stubenville v. Hoge*, 6 Ohio, 17; to the same effect, *Artcher v. Douglas*, 5 Den. 509.

In the case at bar, it is not in express terms stated that Harmon bound himself as principal, and in order that he be estopped from showing a fact, he must have made such admission in his contract, but not having so done in the note herein sued upon, he is not precluded from showing the fact of his being surety on the ground of estoppel. This view of the question is, we think, sustained by the authorities, and is correct in principle.

But is he prohibited from showing the fact of suretyship for the reason that such evidence will contradict or vary the contract?

The proof of such fact does not in the first instance affect his liability, he is still jointly liable for the payment of the note. It only places him in the same position as if he had signed the note "as surety;" he is still absolutely liable on the note — his obliga-

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tion is not changed, and it only places him in such a position as to require of the holder of the note that he do nothing to his prejudice, and that he so use and enjoy his own property and rights as not to infringe upon the rights of others. This question has been adjudicated in many of the State courts.

In the Supreme Court of Massachusetts it is held that the fact that the party is surety and notice thereof to the holder of a note may be shown in an action at law, by extrinsic evidence, on the grounds that it does not affect the terms of the contract, but to prove a collateral fact and rebut a presumption. *Harris v. Brooks*, 21 Pick. 195. That where two or more have signed a note, not designated either as principal or surety, *prima facie*, both are principals, but the fact that one signed as surety may be proved by any competent evidence; it is not necessary that it should so appear by the contract. *Carpenter v. King*, 9 Metc. 511; *Horne v. Bodwell*, 5 Gray, 457.

In New York the Supreme Court say that we cannot assent to the proposition that the fact of a man's being bound as surety could not be averred at law, and we in vain sought for the principle which allowed the inquiry in a court of inquiry, and not in a court of law; we understood the rules of evidence to be the same in both events. *King v. Baldwin*, 17 Johns. 384; 8 Am. Dec. 415.

It is so held in Alabama. *Branch Bank v. James*, 9 Ala. 949. And the authors, in 2 Am. Lead. Cas. 299, say that the true rule is laid down by the Supreme Court of New Hampshire in the case of the *Grafton Bank v. Kent*, 4 N. H. 221, wherein the court said: "We are on the whole of opinion that the rule is that where the maker of a note, who has signed as surety, does not on the face of the paper appear to be a surety, he is considered and treated as a principal, with respect to all those who have *no notice of his real character*, but whenever it is material, a defendant may show by extrinsic evidence that he made the note as surety only, and that it was known to the plaintiff that he was surety only."

The same point has been so decided in Missouri. *Garrett v. Ferguson*, 9 Mo. 125.

It hath been said by a distinguished English chancellor that the common-law courts, even in England, have fallen in love with the doctrines of equity on questions arising out of the contract of suretyship. The writer is of opinion that in the United States,

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courts of law have not only fallen in love with the doctrines, but have actually embraced them.

That great law writer, Judge PARSONS, hath declared that in his opinion, the weight of authority and principle is in favor of the admission of such evidence in courts of law. 1 Pars. on Notes and Bills, 284.

In announcing an opinion on a question as to the admissibility of parol evidence upon a case involving, in principle, the point under discussion, Chief Justice MARSHALL said: "That it was competent to show, by parol, that payment of a note by verbal agreement was to be demanded at a particular bank."

That such evidence does not contradict the instrument, the place of demand not being expressed on the face of the note. *Brent's Exrs. v. Bank*, 1 Pet. 89.

A similar principle is announced by the Supreme Court of the United States in *Ford v. Williams*, 21 How. 287, wherein Ford was permitted to show by parol that although the contract in writing was made with one Bell, that Bell was in fact acting as his agent. This proof, say the court, does not contradict the writing, but explains the transaction.

But further, under the provisions of our statute (Code 1873, § 582) it is enacted: "That any person bound as surety upon any contract for the payment of money, when the right of action has accrued, may require, by notice in writing, the creditor to forthwith institute an action."

Now, was it intended that the surety be driven into a court of equity to first determine the fact that he is a surety, it not appearing on the face of the note, before he could exercise the rights given him by statute, or was it not rather the intent of the legislature, if he was in fact surety, to permit him to so declare to the holder, and by written notice require him to proceed to collect the demand, and that he so do at his peril? We think the latter the more reasonable.

Again, by the provisions of section 584, when action is brought upon such contract, and one of the defendants is in fact surety, he may cause the question to be tried upon the issues of the parties on trial, as afterward, thereby giving to the surety the right to show such fact in action at law.

Taking into consideration the fact that the great weight of authority is in favor of the admission of such evidence and that the

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rule is reasonable, as also the fact that we have a code practice in this Territory, which tends, in a great measure, to break down all distinctions between the forms of proceedings at law and in equity; we are of opinion that the fact that Harmon is in fact a surety upon such note, may be shown in this proceeding at law.

That the correct rule is that in an action at law, on a promissory note executed by two or more, not designating whether the parties have signed either as principal or surety, *prima facie*, both are principals; but it is competent for one of the parties to show, by extrinsic evidence, that he signed the note as surety only, and that plaintiff had knowledge of that fact.

[Omitting the other question.]

The demurrer should have been overruled. The judgment of the court below is reversed and the cause remanded.

Judgment reversed and cause remanded.

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ACTION.

- 1. For breach of marriage promise against promisor's administrator.]** An action for breach of promise of marriage will not lie against the personal representative of the promisor. *Grubb's Adm'r v. Sult* (Gratt.), 765.
- 2. Indemnity for damages caused by negligence of tenant.]** An occupant of a building, who has been compelled to pay damages for injuries sustained by another by falling into a hatchway on the premises negligently left open and unguarded by a third person, may maintain an action against such third person for indemnity. *Ohurchill v. Holt* (Mass.), 355.
- 3. By mortgagee out of possession against purchaser of timber from mortgagor.]** A mortgagee of land out of possession may maintain an action for conversion against one who buys from the mortgagor wood and timber which the latter has wrongfully cut from the premises, but whether the cutting is wrongful is a question of fact, and depends on circumstances. *Searle v. Sawyer* (Mass.), 425.

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AGENCY.

- 1. Indorsement by savings bank treasurer.]** The treasurer of a savings bank cannot bind it by his indorsement in its name, by virtue of his office, although it had directed the sale of its notes, and authorized him to "draw all necessary papers and discharge all obligations." *Bradlee v. Warren Five Cents Savings Bank* (Mass.), 351.

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2. Power of agent to warrant.] In an action for breach of warranty of a safe sold and warranted by an agent, *held*, that there must be proof of express authority from the principal, or of a custom to warrant. *Herring v. Skaggs* (Ala.), 4.

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- Condition for release.] An assignment for the benefit of creditors, requiring the creditors to release the assignor before receiving any benefit under deed, is void on its face. *Duggan v. Bliss* (Col.), 80.

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- Attorney's lien on judgment — how enforced.] An attorney's lien on a judgment does not authorize him to bring a suit thereon in his client's name without his authority. *Horton v. Champlin* (R. I.), 722

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BANK.

1. Correction of erroneous certification of note — evidence — usage.] A bank having erroneously certified a note to be "good," can correct the mistake before liabilities have been incurred or losses sustained in consequence of such certification, and evidence of usage to the contrary is incompetent. *Second National Bank of Baltimore v. Western National Bank of Baltimore* (Md.), 300.
2. Insolvent — issue of draft for depositor's check.] The C. N. Bank cashed a check on the M. and M. Bank, and sent it for payment; the latter bank sent the former its draft for the amount, charged the check to the drawee's account, which was good, and returned him the check as paid. Two days afterward the M. and M. Bank failed, and was placed in the hands of a receiver. On an application by the C. N. Bank to have the receiver pay the amount of the draft to it, *held*, that the transaction was a simple shifting of indebted-

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ness by the M. and M. Bank, and did not impress any trust on the drawee's funds in its hands. *People v. Merchants and Mechanics' Bank* (N. Y.), 532.

3. **Payment of check forged by drawer's agent — laches — estoppel.]** A confidential clerk, having charge of his employer's check-book and bank-book, and whose duty it was to enter all checks on one side of the bank-book, the bank entering all deposits on the other, forged fourteen checks of his employer, at different times; the bank paid them, and he entered them in the bank-book. The bank returned such checks with the book, striking the balances after payment of the first five and again after the payment of the other nine. The employer did not discover the fraud until after the payment of all the forged checks. In an action by him against the bank to recover this amount, *held*, that he was not absolutely estopped by apparent acquiescence in the account thus stated in the bank-book, and could recover unless he had been guilty of negligence in discovering the fraud, and unless the bank, in paying the later forged checks, had relied on his apparent acquiescence of the payment of the earlier ones. *Hardy v. Chesapeake Bank* (Md.), 825.
4. **Right to apply account of depositor on his debt to bank.]** A bank discounted for B. two notes, one executed by him in his official capacity as town treasurer, and indorsed by P., and the other his individual note. B. at the time kept a deposit account with the bank, but the proceeds of the official note were not put to that account. The official note was not paid at maturity. The individual note matured the next day after the official note, and exceeded the balance then on deposit to B.'s credit. The bank president thereupon directed the cashier to apply such balance on the individual notes. Three days later P. tendered to the bank B.'s individual check, payable to and indorsed by himself in his official character, for such balance, and money sufficient therewith to pay the official note, and demanded the note. The bank refused to give it up, and brought suit on it against P. *Held*, maintainable, although the application of the balance on the individual note was not actually made until after P.'s demand. *National Mahaiwe Bank v. Peck* (Mass.), 868.

Wrong payment of deposit by.] *See* NEGLIGENCE, 858.

BANKRUPTCY.

1. **Discharge — fiduciary debt.]** Where the agent of a bank appropriated the proceeds of notes collected by him for the bank, to which they were sent for collection, his liability to the bank therefor may be discharged in bankruptcy. *Green v. Uhilton* (Miss.), 483.
2. **"Fiduciary character" — attorney in fact.]** An attorney in fact does not act in a "fiduciary character" within the meaning of the Federal Bankrupt Act. *Woodward v. Towne* (Mass.), 837.

BAR.

See CRIMINAL LAW, 273.

• BIGAMY.

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BILL OF LADING.

Special indorsement and delivery — wrongful diversion.] The plaintiff at Buffalo discounted a draft on B., on delivery, as collateral, by B.'s agent, of a bill of lading of wheat shipped to B. at New York, the proceeds being used by the agent to pay for the wheat at Buffalo. On acceptance of the draft, the plaintiff delivered the bill of lading to B., with an indorsement to the effect that the wheat was pledged to it for payment of the draft, and was placed in B.'s custody "in trust for that purpose," and was not to be diverted to any other use until the draft was paid. B. sold and delivered the wheat to C., but did not pay the draft. C. knew of the bill of lading and the indorsement before his purchase. *Held*, that he was liable in an action for conversion of the wheat. *Farmers and Mechanics' National Bank v. Haseltine* (N. Y.), 519.

BOND.

1. Consideration — public policy — ultra vires — maturity.] A bond was executed by several for the several payment of a certain sum to a certain savings bank, on a specified day, "or six months after a demand therefor." The bank was embarrassed at the time, and the real purpose of the bond, which was known to the obligors, was exhibition to the bank department as an asset, and to enable the bank to pass examination and continue in business. The expressed consideration was that the bank should continue in business after the execution of the bond. The bank did continue in business for some time, but not until the specified day of payment, and then failed, and was put in the hands of a receiver. *Held*, (1) that the transaction was not against public policy; (2) that it was not *ultra vires* as to the depositors represented by the receiver; (3) that it was upon a valid consideration; (4) that an action was maintainable upon six months' notice and before the specified day of payment. *Hurd v. Kelly* (N. Y.), 567.

2. Surety — conditional delivery.] A bond signed by a principal and several sureties, and complete and perfect on its face, except that several scrolls below the signatures of the sureties were left unsigned, was delivered by the sureties to the principal on condition that he should obtain the execution of additional sureties before delivery to the obligor. He delivered it without obtaining such additional sureties. *Held*, that the sureties were bound unless the obligee had notice of the condition, and that the unsigned scrolls were not sufficient to put him on inquiry. *Nash v. Fugate* (Gratt.), 780.

BREACH OF MARRIAGE PROMISE.

See ACTION, 765.

BURGLARY.

See CRIMINAL LAW, 241.

CARRIER.

1. **Of passengers — ejection for non-payment of fare.]** A railway company may lawfully make and enforce a rule that passengers not procuring tickets before entering a train shall pay a greater specified rate of fare, and passengers are bound to take notice of and conform to such rule. *Toledo, Wabash and Western Railway Co. v. Wright* (Ind.), 277.
2. **—.]** A statute providing that if any railway passenger shall refuse to pay his fare, he may be ejected at any usual stopping-place does not prohibit his ejection at any other safe point. *Id.*
3. **Negligence — passenger on steamboat, going ashore before reaching destination.]** A passenger for hire on a steamboat, attempting to go ashore before reaching his destination, sustained personal injury from the carrier's negligent omission to provide lights. *Held*, that the carrier was liable. *Dice v. Willamette Transportation and Locks Company* (Oreg.), 575.
4. **— street railroad company.]** Street railroad companies are carriers of passengers, bound to extraordinary diligence, and liable for negligence of their agents and employees in and about such carriage; and when passengers are injured by riotous fighting among other passengers, the question of negligence is one of fact, and a declaration alleging negligence in the company, in the failure to have a conductor aboard to preserve order, and in the failure of the driver to suppress the fight or to eject the combatants, is good, and should not be dismissed on demurrer. *Holly v. Atlanta Street Railroad* (Ga.), 97.
5. **Baggage — merchandise.]** A railway passenger had merchandise checked without disclosing its character. There was no evidence of any agreement to carry it as freight, nor that the baggage-master had any authority to receive it as freight or as personal baggage. *Held*, that the company were not responsible for its loss, although the baggage-master knew the character of the baggage, and received similar packages from other passengers. *Blumantle v. Fitchburg Railroad Co.* (Mass.), 376.
6. **Contract for limitation of liability — receipt — negligence of third party.]** The plaintiff's agent delivered three bales of furs to the defendant, a common carrier, for transportation. At the same time he filled up and delivered to the defendant a printed blank receipt, such as was used by the United States Express Company, with their name on it, and containing a condition that the United States Express Company would not be liable for loss or damage except as forwarders, nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value was stated in the receipt. The plaintiff's agent wrote the word "Adams" over the printed words "United States" in the receipt, and drew a pen through the blank left for the statement of valuation, but left it otherwise

CARRIER — *Continued.*

unchanged, and the defendant signed and delivered it. The goods were destroyed by fire on the railway train employed by defendant, caused by the wreck of the train by a broken rail. In an action for the value of the goods, *held*, (1) that the receipt did not constitute the contract; (2) that the limitation, if applicable, applied to each bale separately and not to the three as one shipment; (3) that evidence was admissible to show an oral agreement by the defendant to carry the plaintiff's goods at non-valuation rates; (4) that notwithstanding any limitation of liability the defendant was liable for the full value if the loss was the fault of the railroad company. *Boscovits v. Adams Express Company* (Ill.), 191.

CERTIFICATION.

See BANK, 800.

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See MORTGAGE, 265.

CIVIL DAMAGE ACT.

Proximate cause — death.] An intoxicated person going home at night had to cross a railroad. Next morning he was found on the track killed by being run over by the cars. *Held*, that the intoxication was the proximate cause of his death, and the seller of the liquor which intoxicated him, and the owner of the premises where it was sold, were liable, under the Civil Damage Act, to his widow, for injury to her means of support. *Schroeder v. Crawford* (Ill.), 236.

CONCEALED WEAPONS.

1. **Defective pistol.]** A statute makes it penal to carry about the person, unless in an open manner and fully exposed to view, any pistol except a horseman's pistol. The mainspring being disabled so as to render a discharge of the weapon impossible in the ordinary mode of using fire-arms is no excuse or justification. *Williams v. State* (Ga.), 102.
2. **When permissible.]** Under a law prohibiting the carrying of weapons except on one's premises, or in travelling with baggage, or when acting as or in aid of an officer of justice, it is not unlawful to carry an army pistol to kill wild hogs, and the defendant's declarations at the time of borrowing such a pistol of his purpose are admissible in evidence. *Wilson v. State* (Ark.), 52.

See CRIMINAL LAW, 1, 736.

CONSIDERATION.

See BOND, 567; NEGOTIABLE INSTRUMENTS, 269, 539.

CONSTITUTIONAL LAW.

1. **Double damage — fencing railway.]** A statute making a railway company, neglecting to maintain proper fences along its tracks, liable in double

CONSTITUTIONAL LAW — *Continued.*

damages for stock straying on the track and being killed, is constitutional. *Cairo and St. Louis Railroad Co. v. Peoples* (Ill.), 112; *Little Rock and Fort Scott Ry. Co. v. Payne* (Ark.), 55.

2. **Eminent domain — compensation.]** A statute authorizing the taking of lands for the use of a railroad owned by the State, and of other railroads, without providing for compensation to the owners except from the earnings of the State railroad, is unconstitutional. *Connecticut River Railroad Co. v. County Commissioners* (Mass.), 338.
 3. **High schools.]** Under a constitutional provision that the legislature shall provide a thorough and efficient system of free schools for the conferring a good common-school education, a statute authorizing the establishment and maintenance of township high schools, on a vote of the people, is valid. *Richards v. Raymond* (Ill.), 151.
 4. **Legislature prescribing rule of conclusive evidence.]** The legislature cannot prescribe a rule of conclusive evidence. *Little Rock and Fort Scott Railway Co. v. Payne* (Ark.), 55.
 5. **Municipal corporation — assessment for sidewalks.]** A municipal corporation may make assessment on each individual for the paving and repairing of the sidewalk in front of his lot, and within the fire limits require it to be paved with bricks. *Town of Macon v. Patty* (Miss.), 451.
 6. **Power of State as to militia.]** The Federal Constitution does not confer on Congress unlimited power over the militia of the several States. Its power is restricted to specific objects enumerated, and for all other purposes the militia of the States remain subject to State legislation. Therefore, a provision of a State militia law making it unlawful for any body of men, other than the regularly organized volunteer militia of the State, and troops of the United States, with an exception in favor of students in educational institutions where military service is taught, to associate themselves together, as a military company or organization, or to drill or parade with arms, in any city or town of the State, without the license of the governor, is not inconsistent with any paramount law of the United States, and is a binding law. It is a matter within the regulation, and subject to the police power of a State to determine whether bodies of men with military organizations or otherwise, under no discipline or command by the United States, or of the State, shall be permitted to parade with arms in populous communities and in public places. *Dunne v. People* (Ill.), 213.
 7. **Taxation — “bell-punch” law.]** The act to provide for the levy and collection of an occupation tax on the sale of spirituous, vinous and malt liquors, in quantities less than a quart, and to compel vendors to hire of the tax collector and make use of registers commonly known as the “bell-punch,” is constitutional, although it levies a tax for the use of the State and of counties, without particular specification in the title, and prohibits the collection of like taxes by the counties, and taxes property without reference to its value. *Albrecht v. State* (Tex. Ct. App.), 737.
- Religious use of school-house.]** See SCHOOLS, 160.

CONTRACT.

1. **Rescission — remedy.]** Where a vendor rescinds a sale of goods on credit for fraud, the remedy is trover or replevin, and assumpsit will not lie until the expiration of the term of credit, unless the goods have been converted into money or money's worth. *Kellogg v. Turpie* (Ill.), 163.
2. **Sale — lease of piano — attachable interest.]** One who hires a piano, with an agreement that when and not until the rent amounts to a specified sum the piano should become his property, has no attachable interest before the payment of the full sum; the question whether the owner, by allowing the hirer to remain in possession as ostensible owner, is estopped from denying such ownership, is one of fact; and the burden of proof of non-fulfillment of the conditions of sale is on the owner. *Goodell v. Harbrother* (R. I.), 631.
3. **— successive deliveries.]** The plaintiff having failed in the first deliveries of goods which he contracted to manufacture and deliver, in successive lots, cannot compel the acceptance of goods subsequently manufactured and offered. *King Philip Mills v. Slater* (R. I.), 603.
4. **For transportation — license — revocability.]** A railroad company wrote a letter to a coal company, agreeing that if the latter would place its own coal cars on the road of the former, for transportation of coal from P. to B., the former would allow one-fourth of one per cent per ton per mile for such cars so used, would indemnify the coal company for damages to such cars caused by the fault of the railroad company, and would keep the cars in repair, charging the actual cost thereof, but would not agree for prompt transit, nor to give a number of cars equal to that so furnished. No term was specified for the continuance of the arrangement. The coal company thereupon provided a large number of cars at a large expense, which were so used for ten years. Then, at the request of the coal company, the privilege was indefinitely and in like manner extended, on the same conditions, in consequence of which the coal company incurred great expense. Two years later the railroad company notified the coal company that the allowance would be reduced to one-eighth of one per cent. In an action by the railroad company to recover the difference in tolls and freight for a subsequent period, *held*, that the arrangement evidenced by the letters did not constitute a contract, but was a mere revocable license. *Baltimore and Ohio Railroad Company v. Potomac Coal Co.* (Md.), 316.
5. **Validity.]** A contract was made between employers on the one hand and a clerk and a drayman on the other, for the delivery of sacks of meal and flour from the mill of the former, whereby the clerk was to make out and send with each dray load a correct note of the number of sacks put upon the dray, and any excess of sacks delivered by the drayman above the number noted in the ticket was to be credited to the drayman and charged to the clerk, and any deficiency was to be charged to the drayman and credited to the clerk, the clerk's place being in the mill, and the drayman not being allowed to enter it. *Held*, not immoral or illegal. *Maher v. Millers* (Ga.), 104.

CONTRACT — *Continued.*

6. — *lex loci.*] An action lies in Rhode Island for breach of contract of sale of goods, the contract being made there and valid there, but the goods to be delivered in New York, where the contract was invalid by the statute of frauds. *Hunt v. Jones* (R. I.), 635.
7. Void as against public policy.] A covenant made by a corporation of one State with a citizen of another, not to run a steamboat or allow its machinery to be used on any other boat in any of the waters of certain States, is void as against public policy. *Oregon Steam Navigation Company v. Hale* (Wash.), 803.
- Measure of damages for breach of, between attorney and client.] *See* DAMAGES, 49.
- Legality.] *See* NEGOTIABLE INSTRUMENT, 539.
- Repudiation.] *See* INFANCY, 640.

See CARRIER, 191 ; SUBSCRIPTION, 187.

CONTRIBUTORY NEGLIGENCE.

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CORPORATION.

1. Individual liability of stockholders — not enforceable by another stockholder or his assignee.] A stockholder of a corporation, who is also a creditor of the corporation, cannot enforce the personal liability of the stockholders for his debt, and one to whom he has assigned his claim, for the sole purpose of enforcing such liability, stands in no better position. *Potter v. Stevens Machine Co.* (Mass.), 428.
2. Malicious prosecution.] A corporation is liable to an action for a malicious prosecution conducted by its agents. *Williams v. Planters' Ins. Co.* (Miss.), 494.
3. — requisite proof of.] An action will lie against a corporation for malicious prosecution, but where the prosecution set in motion by an employee of the corporation was a criminal proceeding for embezzlement, express authority or ratification and adoption by the corporation must be shown. *Carter v. Howe Machine Co.* (Md.), 311.

CRIMINAL LAW.

1. Bar — previous conviction fraudulently procured by offender.] Where one who had committed an assault and battery procured himself to be complained of before a justice of the peace, and submitted to a trifling fine imposed by the justice, with the design of avoiding a subsequent complaint by the person assaulted, and a possibly severer punishment, such conviction is no bar to a subsequent indictment. *Watkins v. State* (Ind.), 273.

CRIMINAL LAW — *Continued.*

2. **Bigamy—intent.]** One who remarries, knowing his first wife to be living, or not having a reasonable belief of her death, is guilty of bigamy, without other proof of intent. *Dotson v. State* (Ala.), 2.
3. **Burglary — stable.]** A stable is a “building” within the statute of burglary. *Orrell v. People* (Ill.), 241.
4. **Concealed weapons — in ball room.]** Under a statute prohibiting the carrying of weapons “into a ball room, social party, or social gathering,” an indictment which alleges the going into a ball room with a pistol on the person, but not alleging that there were other persons there assembled, is insufficient. *Rainey v. State* (Tex.), 736.
5. **— Carrying — in parts.]** One who conceals on his person the various parts of a pistol, incapable of use while thus separate, but capable of being readily put together and becoming effective as a pistol, is guilty of carrying concealed weapons. *Hutchinson v. State* (Ala.), 1.
6. **Double punishment — repeal of statute.]** When an obstruction of a highway is declared by statute to be an indictable nuisance, and was previously punishable by a penal suit in the name of the town, a judgment under the statute is not a bar to a proceeding under the other, and the provision for such penal suit is not repealed by the provision for indictment. *Wragg v. Penn Township* (Ill.), 199.
7. **Evidence — accomplice's testimony — corroboration.]** Although a jury may convict on the uncorroborated testimony of an accomplice, yet, if evidence, introduced under objection for the purpose of corroboration, does not tend to connect the defendant with the crime, but it is left to the jury to say whether the principal evidence is corroborated, and they are instructed that if they are satisfied of the defendant's guilt upon the whole testimony, they should convict, this is error. *Commonwealth v. Holmes* (Mass.), 391.
8. **— of good character.]** On the trial of an indictment for larceny, the prisoner's evidence of good character must be confined to his character for honesty and integrity. *State v. Bloom* (Ind.), 247.
9. **— prisoner as witness — impeachment.]** Where a prisoner testifies in his own behalf on the trial of an indictment, his character for truth may be impeached. *State v. Beal* (Ind.), 263.
10. **Juror — member of association to suppress crime.]** On the trial of an indictment for stealing cattle, a person called as a juror is not incompetent merely by reason of his membership in an association, one of whose purposes is to prosecute cattle thieves. *Boyle v. People* (Col.), 76.
11. **— objection to grand — plea in abatement.]** An objection to the qualifications of a grand juror may be raised by plea in abatement. *State v. Davis* (R. I.), 704.
12. **Indictment — conclusion — “against peace and dignity of the State.”]** An indictment concluding, “against the peace and dignity of the statute,” is

CRIMINAL LAW — *Continued.*

invalid, the Constitution requiring the conclusion, "against the peace and dignity of the State," although no exception was taken below. *Cox v. State* (Tex. Ct. App.), 746.

13. **Larceny — lost property.]** To constitute larceny of lost property the finder must have had a larcenous intent at the moment of finding. *Reed v. State* (Tex. Ct. App.), 732.
14. **— retaining money paid by mistake.]** The prosecutor delivered to the defendant a roll containing ten twenty-dollar gold pieces, supposing it to contain only ten silver dollar pieces. The defendant, although when he discovered the mistake he had reason to know the money belonged to the prosecutor, on demand refused to make restitution. *Held*, larceny. *State v. Ducker* (Oreg.), 590.
15. **Lottery.]** Where several persons put money in equal amounts upon a round board numbered around the rim, and each in turn whirls a hand fastened in the center, the one at whose whirl the hand registers the highest number on the rim of the board taking all the money on the board, the owner of the board sometimes putting up money, and sometimes charging a small sum, to be paid by the winner, for the use of the board; this does not constitute a lottery. *Buckalew v. State* (Ala.), 22.
16. **Marriage — solemnization — "lewd and lascivious" cohabitation.]** The statutes of Massachusetts provide, except in the case of Friends or Quakers, that magistrates or ministers may celebrate marriages, and also provide that marriages thus celebrated shall be valid although the magistrate or minister shall have exceeded his authority or jurisdiction; and do not enact that marriages not thus celebrated shall not be valid. *Held*, that a ceremony of marriage, performed in good faith by a man and a woman at a public religious meeting, no third person participating, and no magistrate nor clergyman nor any person supposed to be such being present, and neither party being a Friend or Quaker, is not a valid marriage under the law of Massachusetts, but the cohabitation of the parties thereunder is not "lewd and lascivious," within the statute. *Commonwealth v. Munson* (Mass.), 411.
17. **Murder committed during rape.]** The defendant killed a woman by strangling her while attempting to commit a rape upon her. *Held*, murder in the first degree, within a statute making the killing of any person, by one while engaged in the commission of a felony, murder in the first degree. *Buel v. People* (N. Y.), 555.
18. **New trial — comments of public prosecutor.]** On a criminal trial, the public prosecutor, in addressing the jury, denounced defendant as a "fellow," and a "land thief," and "as guilty as hell;" and the prisoner having previously been convicted and got a new trial, the prosecutor said the new trial was obtained "by a dodge and technicality," and boasted of his ability to convict him before twelve honest men as many times as he could get a new trial. The statute forbade any allusion to a former con-

CRIMINAL LAW — *Continued.*

viction. On account of this language, the defendant being convicted, a new trial was granted, although the trial judge had admonished the jury to disregard it. *Hatch v. State* (Tex. Ct. App.), 751.

19. **Witness** — not leaving court-room on order of the court.] On a trial for receiving stolen goods, on motion of the attorney for the Commonwealth, without objection by the prisoner's counsel, the court directed the witnesses to leave the court-room; and they all left but one, who was in the prisoner's box, held on a requisition for larceny of the same goods. The attorney for the Commonwealth offered that man as a witness. *Held*, not disqualified by reason of his remaining in the court-room, after the order of the court. *Hey v. Commonwealth* (Gratt.), 799.

See CONCEALED WEAPONS, 52, 102.

DAMAGES.

1. **Remote — negligence.**] Owing to the defendant's negligence, its sleeping car, on which a woman was a passenger, caught fire, and she was compelled to leave the car, half clad, and took cold, which resulted in suppression of her menses and a long illness. It being shown that she was menstruating at the time of the accident, and that the illness was traceable to that condition, *held*, that the defendant was not liable in damages therefor. *Pullman Palace Car Co. v. Barker* (Col.), 89.
2. **Measure of — on breach of warranty of safe.**] In an action for breach of a safe sold and warranted by an agent, *held*, that in the absence of fraud the value of articles stolen from the safe by burglars could not enter into the damages. *Herring v. Skaggs* (Ala.), 4.
3. — **in action for negligent killing.**] In an action by a parent, under the statute, against a railway company for the negligent killing of a child, there can be no recovery for loss of companionship and association, and injury to the parent's feelings, but the recovery is restricted to the expenses and the loss of probable services during minority. *Little Rock and Fort Smith Railway Co. v. Barker* (Ark.), 44.
4. — **on breach of contract between attorney and client.**] In case of a special contract for legal services for a percentage of the recovery, where the services are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, he may claim the whole compensation agreed on, subject to such abatement as would, in the natural course of things, have been incurred by him if the services had been continued. *Brodie v. Watkins* (Ark.), 49.
5. — **interest on.**] In an action of damages for breach of warranty on sale of seed, *held*, that the proper measure of damages is the difference in value between the crop raised and the crop represented, without interest. *White v. Miller* (N. Y.), 544.
6. — **interruption of business by blasting.**] Where stones were thrown against plaintiff's shop by a blast, carelessly set off by a contractor em-

DAMAGES — *Continued.*

ployed on a neighboring public work, and his workmen left his shop in fear, and his business was consequently suspended, *held*, that he might recover for the interruption of his business, and the measure of damages was the value of the work thus prevented from being done. *Hunter v. Furren* (Mass.), 423.

— on breach of implied warranty of article to be manufactured.] *See* SALE, 773.

Double — for killing stock.] *See* CONSTITUTIONAL LAW, 55.

Proximate and remote cause.] *See* CIVIL DAMAGE ACT, 236.

See CONSTITUTIONAL LAW, 112.

DECLARATIONS.

See EVIDENCE, 477.

DELIVERY.

See CONTRACT, 603.

DEVICE.

See WILL.

DIVORCE.

See MARRIAGE, 298.

DRUGGIST.

See NEGLIGENCE, 103.

DURESS.

See MARRIAGE, 39.

EASEMENT.

See PARTY WALL, 491.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 333.

ENTIRETIES.

See ESTATE, 254.

ESTATE.

Tenancy by entireties — crops.] Crops raised on land owned by husband and wife together cannot be sold on execution against the husband alone. *Patterson v. Rankin* (Ind.), 254.

ESTOPPEL.

Void execution sale — reimbursement.] Where one bid off land belonging to a testator on a sale under a judgment against his executor, and paid the amount believing that he was getting title, and the money was applied to the judgment debt with which the land was charged by the will, *held*, that the heirs could not recover the land without reimbursing him, and would be enjoined accordingly. *McGee v. Wallis* (Miss.), 484.

See BANK, 325; INSURANCE, 550, 561.

EVIDENCE.

- 1. Declarations.]** Under a law prohibiting the carrying of weapons except on one's premises, or in travelling with baggage, or when acting as or in aid of an officer of justice, the defendant's declarations at the time of borrowing such a pistol of his purpose are admissible in evidence. *Wilson v. State* (Ark.), 52.
- 2. Exhumation of dead body — when compellable.]** In an action on a policy of life insurance, the defense was breach of warranty that the insured had never sustained any serious personal injury. The defendant adduced testimony of an attending physician that the deceased told him that he had been told that his skull had been fractured and trephined in boyhood. The defendant also offered to prove similar declarations to another, and on this evidence asked for the exhumation of the body of the deceased, after a lapse of eighteen months from the commencement of the action. *Held*, that the application was properly denied, the evidence being incompetent and the delay too great. *Grangers' Life Insurance Company v. Brown* (Miss.), 446.
- 3. Parol — to add guaranty to contract of sale.]** It was orally agreed by A. and B. that A. should furnish B. with certain machinery at a specified price, and that B. should accept and pay for the same in a specified manner, and that A. should guarantee that the machine should do B.'s work satisfactorily. The agreement was reduced to writing and signed, not including the guaranty. *Held*, that parol evidence was competent to add the guaranty. *Chapin v. Dobson* (N. Y.), 512.
- 4. — to explain will.]** A testator devised lands in Portland as follows: To Margaret, lot 2 in block 187, and to Esther, lot 1 in block 187. He had no such lots. *Held*, that oral evidence was admissible to show that he did own lots 3 and 4 in that block, and that those lots would pass by the will. *Moreland v. Brady* (Oreg.), 581.
- 5. Res gestæ — declaration of deceased.]** The declarations of one who has been poisoned, as to his present symptoms, are competent, but otherwise of his declarations as to what he had drunk an hour before. *Held v. State* (Miss.), 476.
- 6. — memorandum.]** A memorandum or entry made in the book of a banker or merchant at the time of the transaction, and in the presence of all the parties — plaintiff and defendants — is part of the *res gestæ*, and

EVIDENCE — *Continued.*

the book is admissible in evidence to show it, and to corroborate the memory of witnesses. *Revierre v. Powell* (Ga.), 94.

Impeachment of testifying prisoner.] *See* CRIMINAL LAW, 268.

Of accomplice.] *See* CRIMINAL LAW, 891.

Of character of acceptance.] *See* NEGOTIABLE INSTRUMENTS, 68.

Of character of signing of bill.] *See* NEGOTIABLE INSTRUMENTS, 432.

Of good character.] *See* CRIMINAL LAW, 247.

Parol, to show character of signing of note.] *See* NEGOTIABLE INSTRUMENTS, 816.

To maintain seduction.] *See* SEDUCTION, 361.

Usage.] *See* BANK, 800.

See ACCOUNT STATED, 435; CONSTITUTIONAL LAW, 55; CONTRACT, 191; NEGLIGENCE, 245; NEGOTIABLE INSTRUMENTS, 180.

EXECUTOR.

Trust, when constituted by — liability for trust funds robbed and misappropriated.] A testator having directed his executors to invest \$5,000 in their names as executors, for the benefit of his grandson, the executors in their books charged themselves as trustees and credited the grandson with that sum, invested it in government and State bonds, and deposited them in a bank vault, in a tin box, in an envelope labelled, "investment of \$5,000 for" the grandson, with the date of purchase; the vault was robbed and the bonds were lost; the executors, giving indemnity, procured new bonds in their place, through an agent, whom they had reason to suppose honest, but who appropriated the bonds, so that some of the amount was lost; *held*, (1) that the trust was duly constituted; (2) that the executors were not liable for the robbery or the misappropriation. *Carpenter v. Carpenter* (R. I.), 716.

EXEMPTION.

Homestead — "householder or head of a family."] An unmarried man, keeping house and having his farm hands living with him, but having no children or other persons dependent on him living with him, is not a "householder or head of a family" entitled to a homestead exemption. *Calhoun v. Williams* (Gratt.), 759.

See TAXATION, 597.

EXHUMATION.

Of dead body, when compellable.] *See* EVIDENCE, 446.

EXPLOSION.

See INSURANCE, 884.

FALL.

Of building.] *See* INSURANCE, 873, 884.

FIXTURES.

Portable furnace — gas-fittings.] A portable hot-air furnace and gas-fixtures in a house, although connected with the house in the usual manner, are not part of the realty. *Towne v. Fiske* (Mass.), 853.

FORMER CONVICTION.

See CRIMINAL LAW, 273.

FRAUD.

Action — return of consideration.] If one fraudulently obtains from another his signature to a discharge of a cause of action against him, by misrepresenting the character of the paper, the latter may maintain the action without returning the money. *Mullen v. Old Colony Railroad Co.* (Mass.), 849.

FREIGHT.

See SHIP AND SHIPPING, 707.

GOOD-WILL.

See NEGOTIABLE INSTRUMENTS, 269.

GRAND JUROR.

Objection to — how raised.] *See* CRIMINAL LAW, 704.

HIGHWAY.

Over land filled in below high-water mark — rights of grantees of riparian owner.] A riparian owner platted his land into streets, lots and squares, one of such streets being below high-water mark; the street was subsequently filled out; but was subsequently closed by the owner of all the adjoining lots; *held*, that he could be compelled to reopen it by the owner of some of the other lots. *Providence Steam Engine Co. v. Providence, etc., Steamship Co.* (R. I.), 652.

See NEGLIGENCE, 628.

HOMESTEAD.

See EXEMPTION, 759.

HOSPITAL.

See NEGLIGENCE, 675

HOUSEHOLDER.

See STATUTORY CONSTRUCTION, 444.

HUSBAND AND WIFE.

See MARRIAGE; WITNESS, 440.

INDEMNITY.

See ACTION, 355.

INDICTMENT.

See CRIMINAL LAW, 746.

INDORSEMENT

Before utterance.] *See* NEGOTIABLE INSTRUMENT, 335.

By savings bank treasurer.] *See* AGENCY, 351.

See NEGOTIABLE INSTRUMENT.

INFANCY.

1. *Necessaries — counsel fees.*] If an infant has no guardian, his estate is liable for fees of counsel whose services were beneficial in recovering the estate. *Epperson v. Nugent* (Miss.), 434.
2. *— plantation supplies.*] An infant, carrying on a plantation, is not liable as for necessaries, for supplies and money for the plantation; and boarding with his father, is not thus liable for provisions. *Decell v. Lowenthal* (Miss.), 449.
3. *— how question determined.*] Whether articles are necessaries is a mixed question of law and fact, the court deciding on the fitness, and the jury on the necessity for the articles. *Id.*
4. *Repudiation of contract — recovery of money paid.*] A minor may recover money voluntarily paid by him on a contract which he has repudiated, and from which he derived no benefit, without deduction for damages for the rescission. *Shurtleff v. Millard* (R. I.), 640.

INFRINGEMENT.

See TRADE-MARK, 592.

INJUNCTION.

See MUNICIPAL CORPORATION, 648.

INSOLVENT BANK.

See BANK, 532.

INSOLVENT INSURANCE COMPANY.

See INSURANCE, 522.

INSURANCE.

FIRE.

1. *Explosion — fall.*] Three policies of fire insurance provided substantially that the company should not be liable in case of explosion unless fire en-

INSURANCE — *Continued.*

sued, and then only for the damage by such fire, one of the policies limiting the provision to the explosion of gunpowder or a steam-boiler; and one of them also provided that if a building should fall, except as the result of a fire, the insurance should immediately cease. By an explosion of inflammable gas in the building insured, the larger part of the walls on two sides was blown out, and the roof and partitions fell in, and the ruins of the building and its contents were immediately set on fire by coals from a stove therein. *Held*, that the company was liable on all the policies. *Dows v. Faneuil Hall Insurance Company; Same v. Traders' and Mechanics' Insurance Company; Same v. Merchants' Insurance Company* (Mass.), 384.

2. **Fall of part of building.]** A fire policy was conditioned to cease if the insured building should fall except as the result of fire. The building was equally and completely divided by a brick partition wall, with communicating doors in each story. A girder in one-half fell, bringing down substantially the whole of that part and the goods stored therein, but leaving the other part standing uninjured. A fire afterward broke out in the fallen part, destroying every thing in it save the outer walls, the partition wall, and an elevator, but not communicating to the other part. *Held*, that no action on the policy could be maintained. *Huck v. Globe Insurance Company; Walker v. Queen Insurance Company; Stowe v. Girard Fire and Marine Insurance Company* (Mass.), 373.
3. **Limitation of suit on policy — second action.]** A fire policy was conditioned that no suit upon it should be sustained unless commenced within a year after the claims should accrue. An action was commenced upon it within the year; and on the trial it appeared that in the statement of incumbrances in the application, a mortgage had been omitted. The plaintiff offered to show that the defendant's agent was informed of the mortgage but omitted it by mistake. The court excluded the evidence, but offered to allow the plaintiff to amend his complaint, setting up the mistake. The plaintiff refused, and was nonsuited. Afterward, and after the lapse of a year from the accruing of the claim, he commenced another suit. *Held*, not maintainable, although the defendant's counsel accepted the costs in the first suit, and gave the plaintiff's counsel time to make case or exceptions. *Arthur v. Homestead Fire Insurance Company* (N. Y.), 550.
4. **Leaving premises vacant.]** The owner of an insured dwelling-house, wishing to leave the State, rented the premises, possession to be delivered on Saturday. On the next preceding Friday he sold such personal property as he did not wish to remove, and his family left the premises permanently. He remained on the premises, retaining a bed and bedding and a few other articles of household furniture of small value, until Saturday night, at nine o'clock, the tenant not having taken possession, and then went to a city, a mile distant, and spent the night with his family, who were temporarily sojourning there. On Sunday he returned to the premises and then stayed until seven o'clock P. M., when he again went to the city and

INSURANCE — *Continued.*

spent the night, leaving the said furniture in the house. That night the house was destroyed by an incendiary fire. *Held*, that the court could not determine as matter of law that the premises were vacant and unoccupied, within the meaning of the insurance policy, but it was a question of fact. *Phoenix Insurance Co. v. Tucker* (Ill.), 106.

5. Payable to mortgagee — subsequent insurance by one of mortgagors.] Husband and wife mortgaged the wife's premises, and got an insurance thereon payable to the mortgagee, as his interest might appear. The policy was conditioned to be void in case of subsequent insurance, whether valid or not, consent written on the policy. The wife alone procured another insurance in her own name. *Held*, (1) that the first insurance was of the mortgagors' and not of the mortgagees' interest; (2) that the first insurance was avoided by the second. *Continental Insurance Company v. Hulman* (Ill.), 122.
6. School-house — leaving vacant and unoccupied.] An insurance policy was issued on premises described as a school-house. There was the usual condition against vacancy. The school was discontinued, and the building was subsequently occupied as a dwelling, until April, and was then vacant until the 14th of October, when it was burned while unoccupied. It was held that the insurance was forfeited. *American Insurance Company v. Foster* (Ill.), 134.
7. Waiver of proofs of loss.] The requirement in a fire policy of preliminary proofs of loss within a certain time may be waived by the insurer, and this, notwithstanding a provision that "no waiver or modification of any of the terms or conditions of this policy shall be made in any event," that provision having reference only to the terms and conditions which were essential to the contract of insurance. *Rokes v. Amazon Insurance Company* (Md.), 323.

LIFE.

8. Assignment of life policy in fraud of wife.] A husband procured an insurance upon his life for the benefit of his wife, and delivered her the policy. Afterward, without consideration, and without any design to part with her property therein, but by the undue influence and control of her husband, she was induced to execute an assignment of the policy, without any knowledge of the purpose or purport, to a third person, who assigned it to a fourth, and these assignees paid the premiums. In an action on the policy, wherein the wife was made a party by order of interpleader, *held*, that she was entitled to the amount of the insurance, independent of the question whether the policy was assignable under the statute. *Fowler v. Butterly* (N. Y.), 507.
9. Insolvent company — rights of holders of unmatured policies and death-claims.] An insolvent life insurance company, discontinuing business and failing to carry its policies, is liable to policy-holders in damages for breach of contract; the policy-holders are creditors for the value of their policies

INSURANCE— *Continued.*

at the date of the dissolution of the company ; and the claims of holders of unmatured policies are not to be postponed to death-claims maturing before the dissolution *People v. Security Life Insurance and Annuity Co.* (N. Y.), 522.

10. **Medical examiner—filing of application—estoppel—onus.]** The defendant's medical examiner, at the request of an agent of the defendant who had acted to some extent as general agent and occupied defendant's principal office, filled up an application for life insurance. The applicant made correct answers, but the medical examiner incorrectly and untruly stated some of them in the application. *Held*, that in the absence of evidence on the part of the defendant to show the true authority of the agent, a finding that he was authorized to depute the medical examiner to fill up the application was justified, and defendant was estopped from taking advantage of the mistakes. *Flynn v. Equitable Life Insurance Co.* (N. Y.), 561.

Pledge by wife of policy on husband's life for his debt.] *See* MARRIAGE, 72.

INTEREST.

1. **After maturity.]** A note, providing for a conventional rate of interest, but omitting to provide for the rate of interest after maturity, draws the legal rate after maturity. *Burns v. Anderson* (Ind.), 250.
2. **Payable annually—interest on.]** Upon a contract to pay interest annually on the 15th of May, the interest may be recovered without regard to the time when the principal debt falls due ; and upon such annual interest, interest is collectible from the time when it should have been paid. *Calhoun v. Marshall* (Ga.), 99.

See DAMAGES, 544.

JUROR.

Competency of.] *See* CRIMINAL LAW, 76.

LACHES.

See BANK, 325 ; LIMITATION, 24 ; MUNICIPAL CORPORATION, 643.

LANDLORD AND TENANT.

Lease—when rent due.] Under a lease for years from a specified day, rent conditioned to be payable quarterly on certain days is not due until after midnight of such days. *Ordway v. Remington* (R. I.), 646.

LARCENY.

Of lost property.] *See* CRIMINAL LAW, 782.

See CRIMINAL LAW, 500.

LEASE.

Of piano.] *See* CONTRACT, 681.

LEASE — *Continued.*

Of sewing machine.] *See* SALE, 573.

See LANDLORD AND TENANT, 646.

LICENSE.

See CONTRACT, 816.

LIEN.

Attorney's.] *See* ATTORNEY AND CLIENT, 722.

See VENDOR'S LIEN, 612.

LIMITATION.

Laches.] Where a special deposit of coin was made for safe-keeping, and more than seventeen years elapsed, the death of the depositary intervening more than two years before suit was brought, and eleven years elapsed after the deposit before demand was made for its return, the delay, in the absence of explanation, was unreasonable and conclusive against a recovery. *Wright v. Paine* (Ala.), 24.

See INSURANCE, 550.

LOST PROPERTY.

Larceny of.] *See* CRIMINAL LAW, 732.

LOTTERY.

See CRIMINAL LAW, 22.

MALICIOUS PROSECUTION.

See CORPORATION, 311, 494.

MANDAMUS.

To municipal corporation, to compel selection of proper newspaper for advertising.] A city charter required the common council to designate not to exceed four newspapers having the largest circulation in the city, in which the city advertising should be done. A designation was made, for a year, and acted upon, but the relator insisted and produced evidence that his newspaper had a larger circulation in the city than some of those designated. The proprietors of the other newspapers were not made parties. *Held*, (1) that the court could not by mandamus compel the designation of any particular newspapers in the first instance; (2) that it could not vacate the designation of any already made, nor add the relator's newspaper to those already designated; (3) that the year having elapsed for which the designation had been made, this remedy is not appropriate. *People ex rel. Francis v. Common Council of Troy* (N. Y.), 500.

MARKET.

Stall, property in.] *See* MUNICIPAL CORPORATION, 807.

MARRIAGE.

1. **Betrothal followed by cohabitation.]** Betrothal, followed by cohabitation, but without a present agreement to become husband and wife, does not constitute a valid marriage. *Peck v. Peck* (R. I.), 702.
 2. **Duress.]** One who had seduced a woman was told by her brother-in-law that if he did not marry her he would never marry another woman, and that the community would lynch him; but there was no restraint nor threat of present bodily harm from those present. Having married the woman in consequence of these representations, *held*, that he could not avoid the marriage for duress. *Honnett v. Honnett* (Ark.), 89.
 3. **Limited divorce — cruelty — single act of.]** A single act of personal violence by husband to wife does not constitute "cruelty of treatment" within the statute of divorce. *Hoshall v. Hoshall* (Md.), 298.
 4. **Married woman's charge of separate property.]** A married woman may charge her separate equitable estate expressly in writing, or orally when the contract is for the benefit of herself or the estate. *Elliott v. Gower* (R. I.), 600.
 5. **Pledge by wife of policy on husband's life for his debt — renewal of note.]** Unless forbidden by statute, a wife may pledge a policy of insurance issued on her husband's life for her benefit, as security for his debt evidenced by his note, and a renewal of the note will not discharge the creditor's claim on the policy. *Collins v. Dawley* (Col.), 72.
- Solemnization of.]** See CRIMINAL LAW, 411.

See VENDOR'S LIEN, 612.

MARRIED WOMAN.

See MARRIAGE.

MASTER AND SERVANT.

1. **Negligence — co-servants.]** A fireman on a locomotive engine carelessly threw a lump of coal from the tender, which struck and killed a track repairer, servant of the same company, standing near. *Held*, that the company was liable in damages. *Chicago and North-western Railroad Co. v. Moranda* (Ill.), 168.
2. **— defective machinery.]** An adult employee, injured by imperfect and unfenced machinery, cannot maintain an action against his employer where he himself was familiar with the machinery and had long worked with it without complaint. *Kelley v. Silver Spring Co.* (R. I.), 615.
3. **— low bridge.]** A conductor of a railway train, while standing on the top of a car in motion, in the discharge of his duty, was injured by being brought in contact with a low bridge. He had been well acquainted with its position and character, and accustomed to pass under it. *Held*, that the company were not liable in damages. *Baltimore and Ohio Railroad Co. v. Stricker* (Md.), 291.

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDUM.

On note.] *See* NEGOTIABLE INSTRUMENT, 367.

See EVIDENCE, 94.

MILITIA.

See CONSTITUTIONAL LAW, 214.

MINES.

Support of surface — superincumbent weight.] One who owns minerals and the right of mining in the land of another is bound to leave sufficient supports for the superincumbent soil in its natural state, and in an action for injury by subsidence, if there are buildings on such soil, the burden is on him to show that the subsidence was caused by their weight. *Wilms v. Jess* (Ill.), 242.

MORTGAGE.

1. Of property to be manufactured.] The proprietor of a cotton factory, by an instrument duly recorded, in consideration of and as security for advances made and to be made by T. for the purchase of materials, and for other expenses of the manufacturing, covenanted to deliver the manufactured product to T., and not to sell any of the same himself without T.'s written authority, T. to receive a commission on the entire product. *Held*, valid in equity to secure T. for all such advances, as against a subsequent creditor of the proprietor. *First National Bank of Alexandria v. Turnbull* (Gratt.), 791.

2. Of stock in trade — effect as to creditors.] A mortgage of a stock of goods, such as are usually kept for sale in the particular trade of the mortgagor, with a provision that the mortgagor may retain possession and use and enjoy the mortgaged property, is void on its face as to other creditors of the mortgagor; and where the mortgagee knowingly allows the mortgagor to sell the goods and appropriate the proceeds to his own benefit, the mortgage will be void as to such other creditors, independent of any such provision. *Davenport v. Foulke* (Ind.), 265.

MORTGAGEE.

See ACTION, 425.

MUNICIPAL CORPORATION.

1. Duty in respect to sewers.] In the construction of sewers, a municipal corporation is not liable for the adoption of an erroneous plan, nor for a failure to construct them of sufficient capacity to carry off extraordinary rainfalls, although such might reasonably have been anticipated from experience. *City of Denver v. Capelli* (Col.), 62.

MUNICIPAL CORPORATION — *Continued.*

2. **Feast to strangers—injunctio[n] by tax-payer—laches.]** A city is not liable for the expense of a public entertainment given to strangers upon the resolution of the common council, and an injunctio[n] to restrain payment therefor will issue at the suit of a tax-payer, brought after the entertainment is given, although he knew of the resolution before the entertainment. *Austin v. Coggeshall* (R. I.), 648.
3. **Liability for services of officers.]** A municipal corporation is not liable to make compensation for services of its officers except as provided by its charter and ordinances. *Locke v. City of Central* (Col.), 66.
4. **Market stall—nature of property in public.]** Under a general power to lease, sell or dispose of market stalls for any term it might think proper, a municipal corporation sold a stall in one of the public markets, without limitation of term, and without any special ordinance authorizing the sale and prescribing the term. *Held*, that such sale conferred no absolute property, but only the right of exclusive possession and enjoyment, for market purposes, during the existence of the market, and was therefore not in excess of its powers, and estopped the city and the purchaser from denying the validity of the sale. *Ross v. Mayor and City Council of Baltimore* (Md.), 807.
5. **Negligence—slippery sidewalk.]** Where a foot-passenger, using due care, is injured by falling on a portion of a city sidewalk made of glass and iron, and worn smooth and slippery, solely in consequence of its slipperiness, he can maintain an action against the city therefor, as for a defect in a highway for which the city is liable by statute. *Cromarty v. City of Boston* (Mass.), 381.
6. — **surface water.]** A municipal corporation is not liable for allowing ordinary surface water to escape from a highway on to adjacent land, nor for the results of such ordinary changes of grade as must be presumed to have been contemplated and paid from laying out the highway. *Wakefield v. Newell* (R. I.), 598.
7. — **opening in sidewalk.]** In an action against a municipal corporation for injuries resulting from falling into a cellar door on one of its sidewalks, left open by the owner of the property on its street, there are two questions for the jury: First, is the system adopted by defendant in regard to allowing cellars on its sidewalks reasonably calculated to insure the safety of those who travel thereon by night or day? Second, if so, is the defendant liable in the special case by reason of negligence in the owner, coupled with notice, actual or constructive, to the city? *City of Augusta v. Hafers* (Ga.), 95.

See CONSTITUTIONAL LAW, 451; MANDAMUS, 500; NEGLIGENCE, 626.

MURDER.

See CRIMINAL LAW, 555.

NATIONAL BANKS.

1. **Taxation — action against bank for tax on stock.]** An assessment upon the capital stock of a National bank in gross is invalid, and a provision that the same "shall be paid by each such association for the shareholders thereof," when dependent upon such invalid provision, and incapable of independent enforcement, is also inoperative, and imposes no duty on the bank to pay such tax. *Sumter County v. National Bank of Gainesville* (Ala.) 30.
2. **— remedy for illegal.]** The assessment of a municipal corporation of a tax upon the shares of a National bank in gross, or upon its capital stock, is void, but the remedy is at law, and not by injunction, although the municipal corporation is insolvent. *National Commercial Bank of Mobile v. Mayor, etc., of Mobile* (Ala.), 15.

NECESSARIES.

See INFANCY, 434, 449.

NEGLIGENCE.

- Compounding of prescription by druggist for animal.]** Where a druggist, in good faith, recommends a prescription not as his own but as that of another named person, and thereupon is ordered by his customer to fill it, and does so, charging only for the medicines and for compounding them, he is not responsible to the customer for any damage which may result from the use or administration of the remedy by the latter. *Ray v. Burbank* (Ga.), 103.
2. **Contributory — defect of proof of absence of.]** Where one was found fatally injured in an excavation in a highway, and there was no proof of the circumstances of his death, the jury may consider his habits as to temperance and caution, and his acquaintance with the locality, upon the question whether he had used reasonable care. *Cassidy v. Angell* (R. I.), 690.
 3. **Dangerous premises — hotel — contributory negligence.]** Plaintiff was a guest over night at a hotel kept by defendant. He was assigned room thirty-eight, on the second story. Adjoining that room, and on the same side of the hall, was a door nearly or exactly like the door of the room, and only two and one-half feet distant, communicating with an elevator, opening extending from the second floor to the cellar of the hotel. Gas was dimly burning in the hall. The rooms on the hall were numbered with white figures about one inch in length, which could have been read by any one intent on observing them. The doors of the plaintiff's room and of the elevator-opening were numbered in this way, thirty-eight and forty, respectively, and had knobs exactly alike. Both doors had locks and keys, but neither of them was locked on the night in question. The door to the elevator-opening was hung flush with the surface of the wall of the hall, and opened into the hall, while the door of the bed-room was set back the usual distance and opened into it. Room thirty-eight was a

NEGLIGENCE — *Continued.*

corner one, the last on the hall. Having recently been a guest at the house, and having occupied room thirty-eight, plaintiff believed he knew the location, and could find it without assistance, and discharged the bell-boy who had been directed by the clerk to show him his room. He proceeded, as he supposed, to room thirty-eight, but by mistake opened the door numbered forty, and stepping in fell to the basement through the opening, sustaining severe injuries. An employee of the defendant had previously fallen there and been injured, as the defendant knew. *Held*, that defendant was grossly negligent, and plaintiff was not guilty of material contributory negligence. *Hayward v. Miller* (Ill.), 229.

4. **Evidence of — falling of landing plank from steamboat.]** When a steamboat is putting passengers ashore at a wharf, the fall of the landing plank, while a passenger is carefully walking over it, is presumptive evidence of negligence on the part of the steamboat proprietor. *Eagle Packet Company v. DeFries* (Ill.), 245.
5. **— on previous occasions.]** On the question whether the system adopted by a city in regard to allowing cellars on its sidewalks was reasonably calculated to insure the safety of those who travel thereon, evidence that children upon different occasions had previously fallen into such openings, is admissible. *City of Augusta v. Hafers* (Ga.), 95.
6. **Horse escaping to highway]** One whose horse escaped from an inclosure, and strayed on a city street, without negligence on the part of the owner in suffering the escape or in recapturing the horse, and injured a person on the highway, is not liable for such injury. *Fallon v. O'Brien* (R. I.), 713.
7. **Public hospital.]** One who sustains injury at a public hospital from unskillful surgical treatment by an unpaid attending surgeon may maintain an action against the hospital therefor, although the hospital is a public charity, supported by trust funds, and the plaintiff paid nothing but a small amount for board and attendance. *Glavin v. Rhode Island Hospital* (R. I.), 675.
8. **Control of dangerous element — gas escape.]** Plants in plaintiff's greenhouse were injured by the escape of gas from the defendant's mains, laid in a city street, through a city sewer, owing to the negligence of the city in building the sewer. *Held*, that defendant was liable. *Butcher v. Providence Gas Co.* (R. I.), 626.
9. **Fright of horse by articles left on highway.]** The plaintiff sustained injury through the fright of his horse on a highway by tubing and machinery left by defendant on the highway. *Held*, that defendant was liable. *Bennett v. Lovell* (R. I.), 628.
10. **— by snow heaped in highway — action.]** A. was injured by a horse driven by B., on a highway, and frightened by the overturn of a sleigh by a heap of snow and ice wrongfully made on the highway by C.

NEGLIGENCE — *Continued.*

Held, that A. could maintain an action against C. therefor. *Lee v. Union Railroad Company* (R. I.), 668.

11. **Railway — cattle crossing track.]** Where cattle have escaped from an owner's inclosure and are crossing a railway at a highway crossing, and the engine-driver sees them, but does not stop nor slacken speed, but runs upon and kills one of them, this is gross negligence for which the railway company is liable. *Chicago and Alton Railroad Company v. Kellam* (Ill.) 128.

12. **Wrong payment by savings bank of deposit.]** The by-laws of a savings bank provided that depositors should sign and conform to the by-laws; in case of loss or theft of the deposit-book, should give immediate notice to the bank; and that the bank would not be responsible for payment to a wrong person in absence of such notice. A. subscribed the by-laws by his mark, and was unable to read. Having died, his book was presented to the bank by one fraudulently personating him, and his deposit was paid by the bank. His executors had previously published the usual citation for proof of his will. The bank did not know of his inability to read, and had received no actual notice of the theft of the book nor of his death. *Held*, that the bank was not liable in an action by the executor for the deposit. *Donlan v. Provident Institution for Savings* (Mass.), 358.

Slippery sidewalk.] See MUNICIPAL CORPORATION, 881.

Measure of damages in action for negligent killing.] See DAMAGES, 44.

See CARRIER, 97, 575; DAMAGES, 89; MASTER AND SERVANT, 168, 291, 615; MUNICIPAL CORPORATION, 598; STATUTORY CONSTRUCTION, 536.

NEGOTIABLE INSTRUMENT.

1. **Consideration — good-will.]** The sale of the good-will of a business is a valid consideration for a note, although the business subsequently proves unsuccessful. *Smock v. Pierson* (Ind.), 269.

2. **Evidence of character of acceptance.]** In an action by payee against acceptor of a draft accepted by "A., Treasurer," evidence is admissible to show that the acceptance was in an official capacity and was known to be so by the plaintiff. *Hager v. Rice* (Col.), 68.

3. **— of character of signing.]** In an action on a bill of exchange drawn by H. and accepted by B., "agent of H.," parol evidence is admissible, between the parties to the bill, to show that the intent was not to charge B. personally, but to charge H., whose funds were in B.'s hands. *Hardy v. Pilcher* (Miss.), 432.

4. **— parol, to show character of signing.]** Parol evidence is competent to show that a joint maker of a promissory note, apparently signing as principal, was really a surety, and that this was known to the holders. *Harmon v. Hale* (Wash.), 816.

5. **Indorser before utterance — surety.]** One who as surety and before utterance indorses a note payable to another is liable to the payee as a joint

NEGOTIABLE INSTRUMENT—*Continued.*

maker, although the payee knew him to be a surety. *Carpenter v. McLaughlin* (R. I.), 638.

6. —.] Where one indorses a note, payable to the order of the maker, before negotiation and before indorsement by the maker, his liability is that of indorser, and not of joint maker, if when the note is negotiated the maker's name stands first on the back. *Dubois v. Mason* (Mass.), 335.
7. Irregular indorsement — notice to purchaser.] L., a member of the firms of S. & Sons and P. & Co., made his own notes, payable to the order of P. & Co., and without authority indorsed them in the name of S. & Co. D., another member of the firm of P. & Co., then indorsed the name of that firm as first indorsers. They were presented to plaintiff for discount before maturity, one by a broker and the other by D., who was known to it to be a member of the firm of P. & Co., and discounted by the plaintiff. S. & Sons had no benefit from the notes. *Held*, in an action against S. & Sons, that the facts showed no conclusive notice of the invalidity of the indorsements. *Freeman's National Bank v. Savery* (Mass.), 345.
8. Joint payees — partnership — evidence — presumptions.] A note was executed and delivered, payable to the order of "Chas. & Wm. Feickert." They were not, in fact, partners. Charles Feickert, being in possession of the note, and authorized to collect it, representing that the plaintiffs were partners, sold and assigned it to the plaintiff by a writing signed by him in the style of "Chas. & Wm. Feickert." *Held*, (1) that the note was not *prima facie* payable to a firm; (2) that Charles Feickert's possession was no evidence of a partnership; (3) that title as against both could not pass by joint indorsement; (4) that the authority to collect did not authorize a sale. *Ryhiner v. Feickert* (Ill.), 130.
9. Negotiability — marginal memorandum.] A promissory note bearing in the margin the words, "given as collateral security with agreement," is not negotiable. *Costello v. Crowell* (Mass.), 367.
10. — payable to "trustee" — subsequent indorsement.] A note payable to the order of one as "trustee" is not negotiable, and a subsequent indorser before indorsement by the payee is not liable. *Third National Bank of Baltimore v. Lange* (Md.), 304.
11. Notice of protest — mode of giving.] Where the holder and indorser of a draft reside in the same place, the indorser is ordinarily entitled to personal notice of dishonor, but this is excused where the notary, on the day of dishonor, called at the indorser's place of business, during business hours, to give him notice, but found it locked and no one present to receive notice, and deposited the notice, properly addressed, in the post-office on the same day. *John v. City National Bank of Selma* (Ala.), 35.
12. For the benefit of a third — consideration — support of illegitimate child.] The putative father of an illegitimate child drew a draft payable to his own order, and indorsed payable to the order of the mother, expressly "for the benefit" of the child. *Held*, (1) that the undertaking was not

NEGOTIABLE INSTRUMENT—*Continued.*

illegal; (2) that the draft imported a consideration. *Hook v. Pratt* (N. Y.), 539.

12. Waiver of notice of protest.] A waiver of notice of protest does not waive demand of payment. *Sprague v. Fletcher* (Oreg.), 587.

See PAYMENT, 256.

NEW TRIAL

See CRIMINAL LAW, 751.

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NOTICE.

See NEGOTIABLE INSTRUMENT, 345.

NOTICE OF PROTEST.

Mode of giving.] *See* NEGOTIABLE INSTRUMENT, 35.

NUISANCE.

Blasting — measure of damages — interruption of business.] Where stones were thrown against plaintiff's shop by a blast, carelessly set off by a contractor employed on a neighboring public work, and his workmen left his shop in fear, and his business was consequently suspended, *held*, that he might recover for the interruption of his business, and the measure of damages was the value of the work thus prevented from being done. *Hunter v. Farren* (Mass.), 428.

OFFICE AND OFFICERS.

Liability of city for compensation of officers.] *See* MUNICIPAL CORPORATION, 66.

PARENT AND CHILD.

Custody of child — separation of parents.] In case of separation of husband and wife, equally fit, by character and circumstances, to have the custody of children, the custody of a delicate female child of four years of age will be awarded to the mother for the time being. *McKim v. McKim* (R. I.), 694.

PARTNERSHIP.

Arrangement between connecting railway companies.] Several independent railway companies, whose lines connected, agreed each to carry over its own road the freight cars of the others, marked "Green Line," without breaking bulk, at certain rates, each fixing and collecting its own rates over its own road, and having no interest in other freights. In fixing its own rates, or through freight, each company would ascertain the rates charged by the other companies, and add them to the rates for its own line. These were called "Green Line rates." There was no joint expense or loss or profit, but if a loss could not be traced to any particular road, it was borne by all the carrying roads. *Held*, that this did not constitute a partnership, and the use of the words "Green Line" on bills of lading and a wharf-boat did not estop the companies. *Irvin v. Nashville, Chattanooga and St. Louis Railroad Co.* (Ill.), 116.

See NEGOTIABLE INSTRUMENTS, 130.

PARTY-WALL.

Destruction of building.] Where houses having a party-wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of the part on his ground. *Hoffman v. Kuhn* (Miss.), 491.

PAYMENT.

Note of third person — burden of proof.] The taking of the negotiable note of a third person for an existing debt is *prima facie* payment, and the burden of proving an agreement to the contrary is on the creditor. *Smith v. Bettiger* (Ind.), 256.

Wrong — by bank.] See NEGLIGENCE, 858.

POWER.

See WILL, 136.

PRINCIPAL AND SURETY.

See SURETY, 578.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENT.

PROPERTY.

In market stall.] See MUNICIPAL CORPORATION, 807.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 85.

PUBLIC POLICY.

Contract void as against.] See CONTRACT, 803; BOND, 567.

RAILWAY COMPANY.

Baggage.] See CARRIER, 876.

See CARRIER, 877; CONSTITUTIONAL LAW, 112; NEGLIGENCE; PARTNERSHIP, 116.

RECEIPT.

1. "For safe-keeping."] In the absence of any explanatory evidence, an instrument signed by a depositary, by which he acknowledges that a third person has deposited with him for "safe-keeping" a certain number of dollars in gold coin, which the depositary is to "return whenever called for," will be held a special deposit. *Wright v. Paine* (Ala.), 24.
2. "On deposit to be paid."] In the absence of any explanatory evidence, a writing by which the depositary acknowledges to have received a certain number of dollars in gold "on deposit to be paid" to the depositor "on demand"—will be held a contract for loan of money, payable presently or on demand; and the statute of limitations will begin to run against it from the date of the writing. *Id.*

RESCISSION.

See CONTRACT, 163.

RES GESTÆ.

See EVIDENCE, 477.

RIPARIAN RIGHTS.

See HIGHWAY, 652.

SALE.

1. **Delivery — mere delivery of bill of sale.]** The mere delivery, for value, of a bill of sale of a chattel to the purchaser does not vest title in him as against a subsequent attaching creditor of the vendor. *Dempsey v. Gardner* (Mass.), 339.
2. **Implied warranty — article to be manufactured — measure of damages.]** Defendant agreed to furnish plaintiff as many boxes as they should need to pack manufactured tobacco during a certain season at a specified time, and did furnish such boxes. It is customary for tobacco dealers to rely on the manufacturers of boxes for the selection of proper material and not to test the boxes received to ascertain if they are suitable. The boxes furnished by defendant were of unseasoned wood, which caused the tobacco packed therein to mould and deteriorate in value. *Held*, (1) that the defendant was liable as upon an implied warranty, that the boxes were suitable for the purpose of packing manufactured tobacco for loss from their not being suitable, and (2) that the measure of his liability was the damage done to the tobacco by its moulding. *Gerst v. Jones* (Gratt.), 773.
3. **What is not — monthly payments.]** An agreement for the hire of a sewing machine at a specified rent payable monthly, the machine to belong to the hirer when a certain sum is paid, is not a sale, and the hirer cannot confer title on one who in good faith undertakes to purchase it from him. *Singer Manufacturing Company v. Graham* (Oreg.), 572.
4. **On void execution.]** *See* ESTOPPEL, 484.
See CONTRACT, 603, 631.

SCHOOLS.

Religious use of school-house.] A statute authorizing school directors to grant the temporary use of public school-houses, when not occupied by schools, for religious, literary and other meetings, and for evening and Sunday schools, is not unconstitutional. *Nichols v. School Directors* (Ill.), 160.

High.] *See* CONSTITUTIONAL LAW, 151.

SEDUCTION.

Evidence.] An action for seduction of a daughter may be maintained upon proof that in consequence she became nervous and excitable, and did not appear to be herself, without proof of pregnancy or sexual disease. *Blagge v. Muley* (Mass.), 361.

SEWERS.

See MUNICIPAL CORPORATION, 61.

SHIP AND SHIPPING.

Liability of consignee for freight — offset of price for trimming cargo.] The consignee and receiver of a cargo is liable for the freight, although the master, owing to a dispute with the person who loaded the vessel about the price of trimming the cargo, sailed without signing the bill of lading; and he cannot deduct that price from the freight. *Hatch v. Tucker* (R. I.), 707.

STATUTE.

Repeal of.] *See* CRIMINAL LAW, 199.

STATUTORY CONSTRUCTION.

Fire escapes — duty to provide.] A statute requires owners of tenement houses to provide such fire-escapes as shall be directed and approved by certain commissioners. *Held*, that the duty is presently imperative, and the owners must procure such direction and approval, without waiting for the action of the commissioners. *Willy v. Mulledy* (N. Y.), 586.

2. "Householder."] A "householder" is any head or chief of a domestic establishment, which he keeps together and provides for, but he need not be the actual occupant of a house. *Nelson v. State* (Miss.), 444.

See WITNESS, 440.

STOCKHOLDER.

Individual liability, how enforced.] *See* CORPORATION, 428.

STREET RAILROAD COMPANY.

See CARRIER, 97.

SUBROGATION.

See SURETY, 286.

SUBSCRIPTION.

Death of subscriber before action on.] One who had executed his note to the trustees of a church, as a donation to enable them to buy a bell, died before the bell was ordered. *Held*, that the note could not be enforced although the bell was afterward ordered. *Pratt v. Trustees of Baptist Society of Elgin* (Ill.), 187.

SUNDAY.

Action for tort on.] A., carefully driving on Sunday on a highway in Massachusetts, was injured by the reckless driving of B.; *held*, that A. could maintain an action therefor against B. in Rhode Island, without showing that he was travelling for necessity or charity. *Baldwin v. Barney* (R. I.), 670

SURETY.

1. **Discharge — extension.]** The payee and holder of a promissory note agreed with the principal maker, without the consent of the surety, to extend the time of payment "until after harvest." *Held*, not to discharge the surety, because too indefinite. *Findley v. Hill* (Oreg.), 578.
2. **Failure to sue principal on request.]** If a creditor fails to sue his principal debtor, when solvent, at the request of the surety, and he afterward becomes insolvent, still the surety is not discharged. *Id.*
3. **Subrogation—to prior claim of State on assets of decedent.]** The surety of a deceased debtor to the State, having paid the debt to the State, is entitled to be subrogated to the State's prior claim in the distribution of the debtor's assets. *Orem v. Wrightson* (Md.), 286.
See BOND, 780; NEGOTIABLE INSTRUMENT, 638.

SUPPORT OF SOIL.

See MINES, 842.

SURFACE WATER.

See MUNICIPAL CORPORATION, 598.

TAXATION.

1. **Exemption — "building for religious worship."]** The residence of a priest or clergyman is not exempt from taxation as a "building for religious worship," because it contains one room set apart as a religious chapel. *St Joseph's Church v. Assessors of Taxes* (R. I.), 597.
2. **Federal property.]** Property, the title to which is held by the United States, for whatever purpose, is exempt from State taxation while so held. *People ex rel. McOrea v. United States of America* (Ill.), 155.
3. **Personal property — place of.]** A transfer boat, registered at Cairo, Illinois, plying between that place and Fillmore, Kentucky, on the opposite shore of the Ohio river, and owned half by a railway corporation of Illinois and half by a railway corporation of another State, and used for the transfer of cars of both companies, laid up at Cairo when not in use, both companies having a business office there and the boat hands residing there, is properly taxed there to both corporations. *Irvin v. New Orleans, St. Louis and Chicago Railroad Co.* (Ill.), 208.

Remedy for illegal.] *See* NATIONAL BANKS, 15.

See CONSTITUTIONAL LAW, 737; NATIONAL BANKS, 30.

TENANCY.

By entirety — crops.] *See* ESTATE, 254.

TRADE-MARK.

Sign — infringement.] The sign "Great IXL Auction Co." is not an infringement of the sign, recorded as a trade-mark, "IXL General Merchandise Auction Store." *Lichtenstein v. Mellis* (Oreg.), 592.

TRUST.

See BANK, 582; EXECUTOR, 719.

ULTRA VIRES.

See BOND, 567.

USAGE.

See BANK, 800.

VACANCY.

Of premises.] See INSURANCE, 106, 184.

VENDOR'S LIEN.

Married woman.] A vendor's lien subsists against a married woman. Kent v. Gerhard (R. L), 612.

VERDICT.

Arrived at by chance.] A verdict of damages, ascertained by averaging the aggregate separate markings of all the jurors, in accordance with a precedent agreement to abide the result, is arrived at "by chance," and will be set aside. Goodman v. Cody (Wash.), 808.

WAIVER.

See INSURANCE, 828.

WARRANTY.

By agent.] See AGENCY, 4.

Implied.] See SALE, 778.

WATER AND WATER-COURSES.

See HIGHWAY, 652.

WILL.

1. Devise — execution of power.] A husband devised to his wife, for her life, two-thirds of his entire estate, subject to certain specific legacies, with power to dispose of the same absolutely by will or deed. After his death, the wife acquired the fee of the undivided third of the lands so devised to her. Subsequently she executed a will, making some specific bequests, and then providing as follows: "All and singular the rest, residue and remainder of my estate, real and personal, of whatever kind and wheresoever situate, I hereby order and direct to be converted into money by my executors." "And for that purpose I do authorize and empower them to bargain, sell, and convey my real estate wherever situate, and to make, execute, acknowledge and perfect all deeds and conveyances in law necessary to assure in the purchaser or purchasers thereof the full title thereto, the said real estate to be sold as soon as the same can be done without

WILL—*Continued.*

sacrifice, in the discretion of said executors." "And when my said residuary estate shall be converted into money as aforesaid," etc., with directions for its distribution. She also bequeathed a gold watch and some household furniture, which came to her under her husband's will, to different persons. She died seized of several parcels of real estate. *Held*, that the power of disposition conferred by her husband's will was fully exercised, and her will carried all the property in which she derived any interest under that will. *Funk v. Eggleston* (Ill.), 136.

2. Omission to name or provide for children of testator — reference to another will.] A statute provides that a testator, leaving a child or children not "named nor provided for" in his will, shall be deemed intestate as to such child or children. A testatrix left a will not in itself expressly naming nor providing for her children, but referring to and adopting provisions in her late husband's will, which named and provided for them. *Held*, that this was equivalent to naming and providing for them in her own will. *Gerrish v. Gerrish* (Oreg.), 585.

Parol evidence to explain.] *See* EVIDENCE, 581.

WITNESS.

Statutory construction — husband and wife — criminal cases.] Under a statute providing that "husband and wife may be witnesses for each other in all criminal cases, but they shall not be required to testify against each other, as witnesses for the prosecution," neither is a competent voluntary witness against the other. *Byrd v. State* (Miss.), 440.

Not leaving court-room on order of court.] *See* CRIMINAL LAW, 799.

See ACCOMPLICE, 391.

WORDS.

"Building."] *See* CRIMINAL LAW, 241.

"Building for religious worship."] *See* TAXATION, 597.

"Fiduciary character."] *See* BANKRUPTCY, 337, 483.

"For safe-keeping."] *See* RECEIPT, 24.

"Householder or head of a family."] *See* EXEMPTION, 769.

"Householder."] *See* STATUTORY CONSTRUCTION, 444.

"Lewd and lascivious."] *See* CRIMINAL LAW, 411.

"On deposit to be paid."] *See* RECEIPT, 24.

"Prescription."] *See* NEGLIGENCE, 103.

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